

# **Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America**

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## **I. INTRODUCTION**

In 1786, legal reform activist Benjamin Austin undertook a campaign to promote the use of arbitration over litigation as the primary method of dispute resolution in Massachusetts. Austin argued passionately and practically for the benefits of arbitration over litigation. He did not, however, argue persuasively. Although supported by a groundswell of anti-lawyer sentiment, Austin ultimately failed in securing the triumph of arbitration.

Austin's fatal flaw was not in the power of his arguments, which appealed to a variety of motives for using arbitration, or in the method of arbitration he promoted. His fatal flaw was in framing his arguments of motive and method too strongly within the growing undercurrent of anti-lawyer sentiment that existed at the time. As a result, he conflated lawyers, whom he described as the legal elite, with the problems that besieged the legal system. He focused so intently on promoting arbitration as a replacement for litigation that he neglected the ways in which arbitration and litigation could work in tandem toward legal reform. The result was a polarized public policy debate with legal reformers like Austin—on the one side—promoting arbitration, and the rising legal profession—on the other—promoting litigation in the courts.

While failing in his efforts to replace litigation with arbitration, Austin nevertheless succeeded in encouraging arbitration as a method of dispute resolution. In the years following his writings, Austin saw common law arbitration in Massachusetts joined by a statutory model, with both types of arbitration promoted and practiced alongside, and as an alternative to, litigation in the courts throughout the antebellum period.

Although Austin advocated strongly for arbitration to replace litigation, his ultimate goal was to reform the legal system so as to secure cheap and speedy<sup>1</sup> access to justice for the layperson. Replacing litigation with

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arbitration was simply his means to that end. While Austin failed in his means, he succeeded in his end. As he stated in the preface to the 1814 re-issue of his pamphlet campaign, cheap and speedy access to justice had been secured through legal reforms that drew from the strengths of both arbitration and the courts, and the development of a dispute resolution system where lawyers and laypersons could utilize litigation or arbitration to secure justice.

Exploring Austin's pamphlet campaign in its historical context not only provides us with a snapshot of the arguments for and against dispute resolution in early America, but also serves as a corrective to the prevailing accounts of arbitration in American legal history. As the broader context of Austin's pamphlet campaign will demonstrate, arbitration both began earlier and lasted longer than traditionally recognized. What we would today call arbitration existed in early America in a variety of forms, including common law arbitration, statutory arbitration, and reference by rule of the court. And the reasons why today's disputants choose arbitration over litigation have a broader history, as well; the motives most appealed to by Austin in his pamphlet campaign bear a striking similarity to the reasons individuals give for choosing litigation alternatives to resolve their disputes today.

This article explores the context and content of Austin's pamphlet campaign and its implications for understanding the role of arbitration in early American law in five parts:

Part II sets the stage by providing a brief overview of the prevailing history of dispute resolution and the development of the legal profession in colonial and early America.

Part III discusses the ways in which battles over arbitration and litigation were a part of larger calls for legal reform in Massachusetts in the late 1700s and early 1800s.

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<sup>1</sup> Austin's recurring thesis is that "the 'order' of Lawyers is dangerous in our republic, if they are permitted to pursue their current practice." Benjamin Austin, *Observations on the Pernicious Practice of the Law As Published Occasionally in the Independent Chronicle* 17 (Adams & Nourse 1786), microformed on Early Am. Imprints, Ser. I, no. 19481 (AM. HIST. IMPRINTS) [hereinafter Austin 1786]. In the 1819 reprint of his pamphlet, Austin explained that "their current practice" was one of delay and expense: "the 'order' of Lawyers is dangerous in our republic, if they are permitted to pursue their mal-practice by causing delays, and augmenting unreasonable charges." Austin 1819, *infra* note 214, at 17.

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Part IV demonstrates how, by too closely aligning his proposals for arbitration with the anti-lawyer sentiment of the day, Austin polarized the public policy debate and neglected to address the ways in which arbitration and litigation could work together for legal reform.

Part V highlights that while Austin failed in his promotion of arbitration over litigation, he nevertheless saw the realization of his larger goal, which was to secure cheap and speedy access to justice for the layperson. His goal ultimately was met through legal reforms that combined the strengths of both arbitration and litigation.

Part VI explores Austin's pamphlet campaign in the broader context of dispute resolution in American legal history, with a focus on its implications for how we think about the history of dispute resolution today.

## II. DISPUTE RESOLUTION AND THE LEGAL PROFESSION IN COLONIAL AND EARLY AMERICA

Can any institution be more alarming in a republick, than an 'order' of men who have it in their power to pervert the laws, by pernicious combinations in every judiciary process?<sup>2</sup>

The 'order' of lawyers...so far from being a 'necessary,' are in most cases a useless body. As the laws can be better executed without them; and as they are of late so rapidly increasing in all parts of the Commonwealth, ...it is become absolutely necessary, as we regard the welfare of the community, that the people direct their Representatives to lay before the Legislature, the present pernicious practice of this 'order,' that some measure may be adopted effectually to stop them in their dangerous progress.<sup>3</sup>

In the years following the American Revolution, this type of anti-lawyer sentiment helped fuel a movement to establish arbitration<sup>4</sup> as a replacement

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<sup>2</sup> Austin 1786, *supra* note 1, at 47.

<sup>3</sup> *Id.* at 10–11 (emphasis omitted).

<sup>4</sup> In early America, "arbitration" typically designated settlement of a dispute prior to the commencement of litigation, while "reference" provided for the submission of a dispute to arbitration once litigation had commenced. Early Americans frequently used the terms "arbitration" and "reference" synonymously. Common law arbitration suffered from problems with enforcement. Austin promoted binding arbitration (arbitration with award enforcement) and reference at the level of the Justices of the Peace to complement the existing forms of common law arbitration and reference by rule of the Court of Common Pleas. I have used the term "arbitration" throughout this work, making distinctions between its various forms when necessary.

to the legal system that was fast developing at the time. The early colonists often employed common law arbitration to settle their disputes and, even when disputes were submitted to the largely informal lay judges, the colonists discouraged the use of professional lawyers either by prohibiting them from practicing in the colonies altogether or by permitting the litigant to be represented by a friend or relative instead of a skilled lawyer.<sup>5</sup> According to the prevailing histories, while this system of justice worked in the smaller, economically self-contained communities of the early seventeenth century, it began to fall apart by the end of the century as increasingly complex community and commercial transactions required a more predictable system of justice.<sup>6</sup> The communities themselves also became more diverse, and, as a result of their increasingly dissimilar populations, the courts became the institutions whose decisions were most widely accepted.<sup>7</sup>

As a result of these societal changes, the early seventeenth-century emphasis on resolving disputes through community norms and absolute moral standards began to be replaced by more technical forms of dispute resolution that required trained lawyers.<sup>8</sup> This movement from mediation and arbitration to litigation ebbed and flowed throughout the first half of the eighteenth century. The legal establishment grew stronger in the early 1700s, then met with resistance as the influence of the revivalist ministers of Great Awakening in the 1740s renewed previous criticisms of legal forms of dispute resolution.<sup>9</sup> Ironically, the Great Awakening simultaneously brought about dissent among religious groups that, in turn, “weakened the power of the churches as dispute-settlement institutions and reinforced the role of secular courts.”<sup>10</sup>

In spite of the revivalist criticisms, it was the eighteenth century, with its expansions in populations and commerce and the resulting emergence of a more complex society, in which the legal profession really began to take hold

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<sup>5</sup> MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876* 34 (1976).

<sup>6</sup> *Id.*

<sup>7</sup> JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 35 (1983).

<sup>8</sup> BLOOMFIELD, *supra* note 5, at 34.

<sup>9</sup> AUERBACH, *supra* note 7, at 41 (citing RICHARD L. BUSHMAN, *FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690–1765* 231–35 (1980); Nelson, *supra* note 9, at 120–23); EMIL OBERHOLZER, *DELINQUENT SAINTS: DISCIPLINARY ACTION IN THE EARLY CONGREGATIONAL CHURCHES OF MASSACHUSETTS* 239 (1956)).

<sup>10</sup> *Id.*

in the colonies.<sup>11</sup> Once it took hold, it grew quickly and the number of skilled lawyers and judges increased dramatically by the time of the American Revolution.<sup>12</sup>

### III. ARBITRATION, LITIGATION, AND CALLS FOR LEGAL REFORM IN ANTEBELLUM MASSACHUSETTS

The larger trends in societal change that were characteristic of colonial and early America, as a whole, also played out in Massachusetts, but with different results than those traditionally identified. Massachusetts increased, not decreased, its dispute resolution options, adding a statutory mechanism to encourage submission to arbitration, a statutory form of arbitration, and a broader form of reference by rule of the court to its existing dispute resolution mechanisms.<sup>13</sup> Strong arguments in favor of these new forms of dispute resolution surfaced in the Massachusetts debt crisis of the 1780s.

In the fall of 1786, Daniel Shays, a farmer and former captain of the army, led a revolt of debt-ridden farmers to Springfield, Massachusetts where his followers forced the adjournment of the Massachusetts Supreme Judicial Court and caused the Massachusetts legislature to, among other things, lower court fees.<sup>14</sup> On the outset of the rebellion, the electors of Braintree, Massachusetts pushed back against the rising legal profession by demanding

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<sup>11</sup> RICHARD ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 111 (1971).

<sup>12</sup> *Id.*

<sup>13</sup> These changes in Massachusetts are reflective of similar trends in antebellum Kentucky, New Jersey, and New York, suggesting that what has been seen as an early American decline in the legal profession's support for, and disputants' use of, arbitration may actually be an increase in the variety of dispute resolution options—common law arbitration, common law arbitration with award enforcement, statutory arbitration, and reference by rule of the court—available to individuals in conflict. *See generally* Carli N. Conklin, *Transformed, Not Transcended: Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 AM. J. LEGAL HIST. 39 (2006) (regarding the legal profession's support of these various forms of dispute resolution in Kentucky and New Jersey throughout the antebellum period); Eben Moglen, Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135, 149 (1983) (arguing that a decrease in the use of reference in colonial and antebellum New York may actually be the result of an increase in the use of common law arbitration, as a result of better mechanisms for enforcing the awards); and William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.REV. 193 (arguing for the prevalence of arbitration among New York's merchants from the colonial era through the twentieth century).

<sup>14</sup> PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 187–188 (1998).

that the Massachusetts General Court (Massachusetts' bicameral legislature) discontinue financial grants to Harvard, limit the number of attorneys, and pay attorney fees out of the public treasury.<sup>15</sup>

Shays' Rebellion is a dramatic example of the anti-lawyer hostility that arose in Massachusetts in the latter part of the eighteenth century.<sup>16</sup> This rise in anti-lawyer hostility was largely in response to the economic depression in Massachusetts in the early 1780s, which drove many debtors to court, stimulating both an increase in hostility toward lawyers and an increase in the number of lawyers in the state.<sup>17</sup> In 1740, there was 1 lawyer for every 10,349 people in Massachusetts.<sup>18</sup> This ratio increased to 1:9,349 by 1770, 1:2,872 by 1800, and 1:1,153 by 1840.<sup>19</sup> Reflecting this upsurge in the number of lawyers in Massachusetts, a poem entitled "On the Multitude of Lawyers" appeared in the December, 1789 edition of the Massachusetts Magazine:

I wonder William, Harry said,  
From whom have all those Lawyers bread?  
Quoth Will, I wonder at the same:  
But Harry we are both to blame;  
The more the Dogs the More the Game.<sup>20</sup>

From 1760 to 1840, this type of anti-lawyer hostility grew as lawyers increasingly came to be perceived as an elite class, with more and more new lawyers in Massachusetts coming from the sons of existing lawyers and judges<sup>21</sup> and increasing numbers of college graduates becoming lawyers. From 1761 to 1780, 12.5% of Harvard graduates became lawyers, while 23.8% and 24.1% of Harvard graduates became lawyers from 1781–1800 and

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<sup>15</sup> ALAN HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* 179 (1966).

<sup>16</sup> For a discussion of the connections between Shays' Rebellion and animosity towards lawyers, see Ruth G. Matz, *Lawyers and Shays' Rebellion*, 21 BOSTON B. J. 5 (1977).

<sup>17</sup> GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760–1840* 44–45 (1979).

<sup>18</sup> *Id.* at 200 (see Table 23).

<sup>19</sup> *Id.*

<sup>20</sup> BLOOMFIELD, *supra* note 5, at 54 (quoting ON THE MULTITUDE OF LAWYERS, MASS. MAG. 1 (Dec. 1789)).

<sup>21</sup> GAWALT, *supra* note 17, at 171.

1800–1820 respectively.<sup>22</sup> Not only were more college graduates becoming lawyers, but also more lawyers were becoming professionally trained.

Massachusetts had a bar association for attorneys early on, and its membership became increasingly professionalized over time. In 1785, the legislature passed “An Act Regulating the Admission of Attorneys.”<sup>23</sup> The Act included both personal and professional qualifications, stating that, to be admitted as an attorney in Massachusetts, one had to be “of good moral character, and well affected to the Constitution and Government of this Commonwealth, and hath had opportunity to qualify himself for the office, and hath made such proficiency as will render himself useful therein....”<sup>24</sup> Prior to admission, aspiring attorneys also had to take an oath in court. The content of this oath attests to some of the difficulties surrounding the rising legal profession. Aspiring attorneys were required to swear that they would “do no falsehood” and that they would not “wittingly or willingly promote or sue any false, groundless, or unlawful suit, nor give aid or consent to the same” and to “delay no man for lucre or malice.”<sup>25</sup>

The same 1785 General Court Act that regulated admission as an attorney also provided for layperson selection of counsel.<sup>26</sup> By “such counsel”, the legislature intended to allow parties to select layperson representation, but the lawyers disagreed, successfully asserting that “‘counsel’ could be interpreted only to mean a professional lawyer.”<sup>27</sup>

Under the Bar’s standards, college graduates were required to complete a three year apprenticeship while non-college graduates were required to complete a five year apprenticeship.<sup>28</sup> This system of a long, formal

<sup>22</sup> *Id.* at 144 (See Table 17). Among other colleges graduating significant numbers of Massachusetts lawyers, Yale, Brown, and Dartmouth also saw increased percentages of graduating lawyers from 1770–1835. However, Williams and Bowdoin saw decreases in their percentages of graduating lawyers from 1795–1835. See GAWALT, *supra* note 17, at 141, 142–143 (Tables 14–16).

<sup>23</sup> See *An Act Regulating the Admission of Attorneys*, 1785 MASS. ACTS 475–76, available at The State Library of Massachusetts Electronic Repository, <http://archives.lib.state.ma.us/actsResolves/1785/1785acts0023.pdf> (last visited April 12, 2013, 7:09 PM) (hereinafter *An Act Regulating Admission*).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> GAWALT, *supra* note 17, at 60 (citing to a similar permission of layperson counsel by the Superior Court in 1778 and to legislative and newspaper records following passage of the 1785 Statute).

<sup>28</sup> *Id.* For an example of bar association rules, see *Rules of the Bar of the County of Essex, Massachusetts (1831)*, in THE GOLDEN AGE OF AMERICAN LAW 85–89 (Charles M. Haar ed., 1965).

education and recommendation by the Bar association for admittance appealed to lawyers because it restricted the number of additional lawyers entering the profession and helped guarantee higher incomes and professional status based on seniority.<sup>29</sup> This professional class of lawyers in Massachusetts continued to grow in the 1800s and provided fuel for continued anti-lawyer sentiment in the 1830s.<sup>30</sup> By the mid-1800s, lawyers were key figures in the legislative and executive branches and were dominant in the judicial branch.<sup>31</sup>

The judicial branch of Massachusetts included a Court of General Sessions for each county, which was comprised of that county's justices of the peace and which met quarterly.<sup>32</sup> The Justices of the Peace, who were appointed by each county, operated as one-man courts; they formed the basis of the Massachusetts judiciary.<sup>33</sup> Most men appointed to the judiciary in Massachusetts in the 1700s were not trained lawyers, but were upstanding men in the community.<sup>34</sup> As a result, in pre-revolutionary Massachusetts, legal decision-making was retained by laypersons in the local communities.<sup>35</sup>

However, the structure and make-up of the Massachusetts judiciary began to change after the American Revolution. In 1782, the judicial system was revised, so that it consisted of the Supreme Judicial Court, the County Courts of Common Pleas, and the Judges of General Sessions of the Peace (consisting of the Justices of the Peace, sitting jointly<sup>36</sup>), as well as specialty

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<sup>29</sup> GAWALT, *supra* note 17, at 136–137.

<sup>30</sup> *Id.* at 170–171. For an exploration of the tensions lawyers faced in this time period, see Anton-Hermann Chroust, *The Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 NOTRE DAME L. 48 (1959–1960) and Anton-Hermann Chroust, *The American Legal Profession: Its Agony and Ecstasy (1776-1840)*, 46 NOTRE DAME L. 487 (1970–1971).

<sup>31</sup> *Id.* at 189.

<sup>32</sup> WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* 15 (1975).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 33. For example, from 1769–1774, nine of the eleven justices of the Superior Court of Massachusetts had never practiced law and only three of these nine had studied for the Bar. This trend was also reflected in the lower courts of Massachusetts. See NELSON, *supra* note 32, at 33.

<sup>35</sup> *Id.* at 36.

<sup>36</sup> For a description of the relationship between the Justices of the Peace and the Courts of General Sessions, see *FOUNDING FAMILIES: DIGITAL EDITIONS OF THE PAPERS OF THE WINTHROPS AND THE ADAMSES*, JAMES TAYLOR, ED., (2007), available at <http://www.masshist.org/publications/apde/portia.php?id=LJA01d091> (last visited April 12, 2013, 5:58 PM).



courts for admiralty (until 1789) and probate.<sup>37</sup> Reform was necessary to eliminate the lack of finality in the lower Courts of Common Pleas' decisions, a problem that led to increased expenses for parties and profitable delays for lawyers since most Courts of Common Pleas' cases were then sent on appeal to the Supreme Judicial Court.<sup>38</sup>

The path to such reform was not clear and the conflict over legal reform in Massachusetts found its expression in the political sphere. In the two decades following Austin's 1786 newspaper campaign, that conflict was battled out between the Anti-Federalist Party (which, in 1790, became the Republican Party) on the one hand, and the Federalist Party on the other.<sup>39</sup> The Republican Party had Radical and Moderate wings, both of which played a pivotal role in the debates surrounding the conflict.

The Federalists proposed relatively modest reform of the judiciary, including a guaranteed income for the Supreme Court justices, a limit to appeals and reviews to prevent unnecessary delays, special law terms to be held annually to decide difficult questions and points of law that had arisen throughout the year, expansion of the Court of Common Pleas' jurisdiction with their decisions to be final in cases of low value, juries that would under no circumstances interpret the law, and published decisions of the Supreme Judicial Court,<sup>40</sup> to encourage consistency in decisions.

In contrast, the Radical Republicans promoted much broader reform. Their reforms reflected their belief that trained lawyers were immoral men, influenced by money:

Who would make out, clear as light  
That white was black, and black was white  
And with like arguments well strung  
That wrong was right, and right was wrong.<sup>41</sup>

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<sup>37</sup> Prior to 1782, the Massachusetts judicial system consisted of the Superior Court of Judicature, the Inferior Court of Common Pleas, the Judges of General Sessions of the Peace, and specialty courts for Probate and Admiralty. GAWALT, *supra* note 17, at 211. The courts underwent additional changes after 1782. The Judges of General Sessions became the General Courts of Sessions in 1807, were largely subsumed within the Common Pleas' courts from 1809–1819, and were finally abolished in 1828. The County Courts of Probate continued, but the "District Courts of Admiralty [were] superseded by the federal court system in 1789." GAWALT, *supra* note 17, at 211.

<sup>38</sup> *Id.* at 184–85.

<sup>39</sup> *Id.* at 184.

<sup>40</sup> ELLIS, *supra* note 11, at 188–90.

<sup>41</sup> *Id.* at 200.

Anti-lawyer proposals for radical reform of the justice system came from agrarian reformers who criticized the expenses of the Courts of Common Pleas and the Court of General Sessions. The reformers suggested, among other things, abolishing the Court of General Sessions and enlarging the jurisdiction of the Justices of the Peace.<sup>42</sup> The effect of such reforms would be to return judicial decision-making to the local level and to the Justices of the Peace, who often were laypersons. Radical judicial reform in Massachusetts promoted an elected judiciary,<sup>43</sup> which was another attempt at local control, and encompassed calls for extrajudicial dispute resolution by promoting the use of common law arbitration,<sup>44</sup> the creation of a system of statutory arbitration (called reference) as a substitute to the lower courts,<sup>45</sup> and a limit to the use of lawyers in dispute resolution.<sup>46</sup>

Benjamin Austin shared the Radical Republicans' desire to replace the existing litigation system with arbitration. The son of a prominent Boston merchant,<sup>47</sup> Austin was a visible and vocal figure of the Massachusetts Radical Republicans.<sup>48</sup> In 1786, Austin wrote a series of articles that were then published together in a pamphlet entitled "Observations on the Pernicious Practice of Law" under the pen name "Honestus."<sup>49</sup> Through his talented and persuasive writing, Austin became the state's greatest expositor of Radical judicial reform in the late 1700s<sup>50</sup> and one of the greatest proponents of arbitration in post-Revolutionary Massachusetts.<sup>51</sup> Austin went

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<sup>42</sup> NELSON, *supra* note 32, at 70.

<sup>43</sup> ELLIS, *supra* note 11, at 199.

<sup>44</sup> *Id.* at 198–99.

<sup>45</sup> *Id.* at 201. Although reference as defined here is the submission of a dispute to arbitration after litigation has commenced, the terms often were used synonymously in early America, as seen in the Massachusetts statutes on arbitration and reference in the antebellum period and HENRY CAMPBELL BLACK, A LAW DICTIONARY CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 238 (1891, 1910).

<sup>46</sup> ELLIS, *supra* note 11, at 200.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 208–09.

<sup>49</sup> For a detailed discussion of the newspaper letters that were compiled into Austin's pamphlet campaign, see Frederic Grant, Jr., *Benjamin Austin, Jr.'s Struggle with the Lawyers*, 25 BOSTON BAR J. 19 (1981) and Frederic Grant, Jr., *Observations on the Pernicious Practice of the Law*, 68 A.B.A. J. 580 (1982).

<sup>50</sup> ELLIS, *supra* note 11, at 208–09.

<sup>51</sup> GAWALT, *supra* note 17, at 52.

on to serve as a Massachusetts state senator in the 1790s<sup>52</sup> and his original 1786 letters were reproduced for public distribution in 1814.

Austin's promotion of arbitration over litigation was part of the Radical Republicans' response to a change in the make-up of the judiciary that had been occurring in Massachusetts.<sup>53</sup> In the 50 years following the American Revolution, 24 of 26 Massachusetts Supreme Judicial Court<sup>54</sup> justices were lawyers.<sup>55</sup> As trained lawyers, the judges had begun to assume more power to assert the law. For example, in 1808, the Supreme Judicial Court in *Coffin v. Coffin*<sup>56</sup> held that judges were required to instruct their juries on every material point at issue.<sup>57</sup> By 1830, the judges stated the laws to the juries, who were then required to abide by the court's instructions in order for their verdicts to stand.<sup>58</sup> This practice of judicial instruction was accepted by some as a reflection of the need for predictable rulings in the increasingly commercialized economy of nineteenth-century Massachusetts.<sup>59</sup> Those who accepted this judicial role believed that the juries were no longer capable of providing such predictability in light of the post-Revolution dissipation of shared ethical norms.<sup>60</sup> Federalist reformers believed that the jury was no

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<sup>52</sup> ELLIS, *supra* note 11, at 208–09.

<sup>53</sup> In his pamphlet campaign, Austin argued for five reforms: “proposals for the use of arbitrators, for a system of concise codes of American law, for the right of a person to present his own case in person or in writing, for the right of every man either to appear personally or be represented by a friend who is not necessarily a member of the bar, and finally, for the appointment of an advocate-general to represent those accused of crime.” Erwin C. Surrency, *The Pernicious Practice of Law—A Comment* 13 AM. J. LEGAL HIST. 241, 242 (1969). For a detailed list of the reforms, see Austin, *supra* note 1, at 25. The first four of these proposed reforms dealt with Austin's larger call for layperson administration of justice; Austin's argument for arbitration to replace the system of litigation largely resulted from, and sought to address, the problems presented by the second, third, and fourth areas of reform.

<sup>54</sup> The Supreme Judicial Court was formerly called the Superior Court. See NELSON, *supra* note 32, at 70.

<sup>55</sup> *Id.* (citing WILLIAM SULLIVAN, AN ADDRESS TO THE MEMBERS OF THE BAR OF SUFFOLK, MASSACHUSETTS, AT THEIR STATED MEETING ON THE FIRST TUESDAY OF MARCH, 1824 41–42 (1825); MASS. B. ASS'N, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1692–1942 51).

<sup>56</sup> 4 Mass. 1 (1808) (cited in NELSON, *supra* note 32, at 168).

<sup>57</sup> NELSON, *supra* note 32, at 168.

<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.* at 165.

<sup>60</sup> *Id.* at 166.

longer able to bring shared community norms into the courtroom and consistently apply them as law.<sup>61</sup>

Republicans strongly opposed any attempts to usurp the law-making role of the juries.<sup>62</sup> While they supported the judge's role in instructing the jury on matters of law, especially when they felt that the law had been unnecessarily complicated by the parties' attorneys, they spoke strongly against the idea that the judge, alone, should decide matters of law.<sup>63</sup> Such attempts to place the law-making function solely in the hands of the judiciary further instigated anti-lawyer hostility and, from 1790 to 1840, calls for judicial reform included removing lawyers from the judiciary.<sup>64</sup>

In the last two decades of the eighteenth century, the Massachusetts state legislature passed several acts to instigate legal reform. Indeed, in the time immediately following the American Revolution, it was the legislature that most greatly conflicted with the lawyers for control of the law.<sup>65</sup> Individuals voicing anti-lawyer sentiment petitioned their legislators to get rid of the legal elite<sup>66</sup> and some of the protestors' more minor reforms were enacted in the 1780s, including two 1786 acts seeking to limit litigation in the courts of law, primarily by setting out statutes of limitation for various causes of action.<sup>67</sup> Of greatest significance for Austin's campaign was the legislature's passage of a 1786 Act for Rendering Processes of Law Less Expensive, which required Justices of the Peace to encourage disputants before them to submit to arbitration, and the 1786 Referee Act, which set forth a statutory form of arbitration for the resolution of disputes.<sup>68</sup>

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<sup>61</sup> *Id.* at 170–71.

<sup>62</sup> ELLIS, *supra* note 11, at 197.

<sup>63</sup> Austin 1786, *supra* note 1, at 5, 10, 14.

<sup>64</sup> GAWALT, *supra* note 17, at 99.

<sup>65</sup> *Id.* at 47.

<sup>66</sup> *Id.* at 48.

<sup>67</sup> *An Act for the Limitation of Personal Actions, and for Avoiding Suits at Law*, 1786 MASS. ACTS 168–71, available at The State Library of Massachusetts Electronic Repository, <http://archives.lib.state.ma.us/actsResolves/1786/1786acts0052.pdf> [hereinafter *Limitation of Personal Actions*]; *An Act for the Limitation of Real Actions*, 1786 MASS. ACTS 29–30, available at The State Library of Massachusetts Electronic Repository, <http://archives.lib.state.ma.us/actsResolves/1786/1786acts0013.pdf> [hereinafter *Limitation of Real Actions*].

<sup>68</sup> *An Act for Rendering Processes in Law Less Expensive*, 1786 MASS. ACTS 105–11 available at The State Library of Massachusetts Electronic Repository, <http://archives.lib.state.ma.us/actsResolves/1786/1786acts0043.pdf> [hereinafter *An Act for Law Less Expensive*]; *An Act for Rendering the Decision of Civil Causes, as Speedy, and as Little Expensive as Possible*, 1786 MASS. ACTS 55–57, available at The State Library of Massachusetts Electronic Repository,

## LOST OPTIONS FOR MUTUAL GAIN

Although Massachusetts had long upheld common law arbitration, where parties voluntarily chose to submit their disputes to arbitrators of their own choosing instead of pursuing litigation, the 1786 Act for Rendering Processes of Law Less Expensive strongly encouraged arbitration as an option for disputants who had brought their claims before a Justice of the Peace.<sup>69</sup> The 1786 Referee Act also encouraged arbitration by providing a formal avenue by which voluntary arbitration awards could be entered as a judgment of the Court of Common Pleas and made final.<sup>70</sup> Parties in dispute were instructed to follow a statutory form of submitting their claims to arbitration and the court would then enforce the arbitration award.<sup>71</sup> Those who supported the 1786 Referee Act were hopeful that it would limit lawyers to criminal cases and cases involving realty (two bodies of law that were traditionally excluded from arbitration).<sup>72</sup> Although there was a decline in court action following

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<http://archives.lib.state.ma.us/actsResolves/1786/1786acts0021.pdf> [hereinafter *1786 Referee Act*].

<sup>69</sup> *An Act for Law Less Expensive*, *supra* note 68.

<sup>70</sup> *1786 Referee Act*, *supra* note 68.

<sup>71</sup> *Id.* at 55–57. In his work, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 151, (1977), Morton Horwitz argues that judges and lawyers undermined the purpose of the Referee Act by increasing reversals on technicalities and declaring that, “When parties leave the common law for these peculiar remedies, they cannot expect the Court to show them particular favor.” HORWITZ, *supra* note 71, at 151 (citing *Durrell v. Merrill*, 1 Mass. 411, 413 (1805) (argument of counsel); *Whitney v. Cook*, 5 Mass. 139, 143 (1809) (Parsons, C.J.); *Id.* at 151 (citing *Mansfield v. Doughty*, 3 Mass. 398 (1807); *Id.* at 151 (citing *Monosiet v. Post*, 4 Mass. 532 (1808). *See also* *Short v. Pratt*, 6 Mass. 496 (1810)). Horwitz makes this same claim for arbitration in early America, as a whole. In contrast, my research in New Jersey and Kentucky demonstrates that, far from reversing on technicalities, the courts simply upheld common law arbitration under the common law and upheld statutory arbitration according to the terms of the statute. *See generally*, CONKLIN, *supra* note 13. Wesley A. Sturges suggests a similar trend in his work, *Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN. L. REV. 819 (1962) at 819–820. In fact, the language quoted here by Horwitz suggests not that the judges used the *Referee Act* as a means by which to legislate arbitration out of existence, but that the judges had rightly identified the different requirements of arbitration under the common law and arbitration under the statutory law, and had applied those requirements accordingly.

<sup>72</sup> *The Referee Act* covered civil cases only, excluding realty. Although Morton Horwitz points to the realty exclusion as an act of judicial limitation of arbitration, this exclusion was in keeping with the English common law, where criminal and realty cases traditionally had been excluded from arbitration. (*See* HORWITZ, *supra* note 71, at 161; 3 BLACKSTONE’S COMMENTARIES, *infra* note 247, at 15–17; and “arbitration” in ARCHIBALD BROWN, *A New Law Dictionary* 31 (1874)). Common law arbitrations were often oral, both in agreement and award. Realty cases may have been excluded from

these Acts, in 1789 the legislature subsequently passed a statute which allowed litigants once again to go directly to the Court of Common Pleas without first going through the Justice of the Peace, where they were encouraged to use arbitration. Within a year, most disputants were once again appearing in court with their lawyers.<sup>73</sup> However, under the 1786 Referee Act, reference remained a post-filing path to arbitration even for these disputants.<sup>74</sup>

Even as the legislature encouraged the use of lay arbitrators, it simultaneously strengthened the requirements for aspiring lawyers. In the years following the Referee Act, the legislature introduced a statutory form of professional training standards for lawyers and the Judiciary Committee, which was controlled by lawyers, approved the new admissions standards as part of the Revised Statutes.<sup>75</sup> The legislative standards mirrored the previous Bar standards by requiring three years of study in an apprenticeship or law school for admittance to the Bar but departed from the previous standards by removing the need for Bar recommendation in order to enter into or advance within the profession.<sup>76</sup> Although the standards removed the role of the Bar as guardian of the profession, the Bar did not oppose them as being anti-lawyer.<sup>77</sup> These movements satisfied those promoting more modest reform but did not satisfy those who wished to see more radical reform of the legal profession.<sup>78</sup>

While radical reformers did achieve some victories in the legislature, those victories were short-lived. As discussed previously, while the 1785 Act Regulating the Admission of Attorneys provided for layman representation,<sup>79</sup> the word “counsel” in the statute was interpreted so restrictively as to include only professional lawyers.<sup>80</sup> The Act was intended to open up the practice of law to laymen but the courts, controlled by the legal elite, restricted it to those individuals having formal legal training.<sup>81</sup> Thus, in spite of the

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common law arbitrations due to prohibitions against parol agreements in land title transactions.

<sup>73</sup> BLOOMFIELD, *supra* note 5, at 55–56 (citing Charles R. McKirdy, *Lawyers in Crisis: The Massachusetts Legal Profession, 1760–1790* (1969) (unpublished PhD. Dissertation, Northwestern University)).

<sup>74</sup> *1786 Referee Act*, *supra* note 68.

<sup>75</sup> GAWALT, *supra* note 17, at 183–85.

<sup>76</sup> *Id.* at 184–85

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 186.

<sup>79</sup> *Id.* at 60.

<sup>80</sup> GAWALT, *supra* note 17, at 60

<sup>81</sup> *Id.* at 60–61.

legislature's attempt to enact substantial reform, lawyers challenged the right of laypersons to practice the law and evaded legislative prohibitions against the legal profession's growing exclusivity.<sup>82</sup> The layperson's selection of counsel was further limited when, in March of 1810, the Supreme Judicial Court of Massachusetts required a recommendation of the Bar before a lawyer could practice before the Court of Common Pleas and all higher courts.<sup>83</sup> This meant that lawyers, for the first time, were formally in control of entrance to and advancement within the profession.<sup>84</sup>

At the same time that the practice of law was becoming increasingly professionalized, lawyers began replacing laypersons in legislative branch of government. For a time, Massachusetts had prohibited lawyers from serving in its colonial assembly.<sup>85</sup> This practice likely resulted from the belief that there existed an inherent conflict in allowing lawyers, who profited from the law, to make the law.<sup>86</sup> After the American Revolution, the number of lawyers in the legislature began to grow. In 1780, only 10.4% of senators and 1.5% of representatives elected to the General Assembly of Massachusetts were lawyers.<sup>87</sup> By 1800, 18.7% of Massachusetts State senators and 10.2% of Massachusetts State representatives were lawyers, with the Senate reaching an antebellum high of 37.5% from 1830–1840 and the House reaching an antebellum high of 14.9% in 1820.<sup>88</sup>

Although lawyers did not comprise a majority of either legislative body, they did, over time, have a great impact on legislation. Lawyers were much more represented among the Federalists and the Moderate Republicans than the Radical Republicans. Although each party strongly promoted its own method of judicial reform, it was the Federalist Party that controlled Massachusetts politics from 1797 to 1806<sup>89</sup> and the reforms enacted during that time reflected their control. Such reforms included enlargement of the Court of Common Pleas jurisdiction, increased salaries for judges, and failed attempts to limit jury powers.<sup>90</sup> In contrast, the Republicans asserted that the Federalist Party was controlled by lawyers who wanted a complicated system

<sup>82</sup> *Id.* at 68–69.

<sup>83</sup> GAWALT, *supra* note 17, at 116 (citing *Rules of the Supreme Court*, Tyng, Reports, 5:382–385).

<sup>84</sup> *Id.* at 117.

<sup>85</sup> AUERBACH, *supra* note 7, at 8.

<sup>86</sup> BLOOMFIELD, *supra* note 5, at 43.

<sup>87</sup> GAWALT, *supra* note 17, at 67 (See Table 8).

<sup>88</sup> *Id.*

<sup>89</sup> ELLIS, *supra* note 11, at 207.

<sup>90</sup> *Id.* at 196.

of law that would support their professions.<sup>91</sup> The Radical Republicans wanted to see more equitable and convenient justice practiced at the hands of laypersons; they objected to judicial reform that would increase the judges' salaries or the courts' power.<sup>92</sup>

The hostility between the Federalists, on the one hand, and the Radical Republicans, on the other, was nowhere more evident than in the events surrounding the feud between Benjamin Austin and a Boston lawyer named Thomas O. Selfridge, a feud that ultimately ended in the death of Benjamin Austin's son, Charles, in August of 1806.<sup>93</sup> In July of 1806, Benjamin Austin was in charge of organizing a Republican tent at a Fourth of July Celebration in Boston.<sup>94</sup> Austin ordered food to be catered from a local tavern and agreed to pay the tavern owner from the profits made from tickets sold at the tent.<sup>95</sup> As the parade made its way toward Austin's tent, the tent was overrun by a crowd that had gathered around the Tunisian Ambassador to the U.S.<sup>96</sup> The crowd entered Austin's tent, where they ate and drank without purchasing tickets.<sup>97</sup> As a result, at the end of the day, Austin had not collected enough money from ticket sales to fully reimburse the caterer for his expenses.<sup>98</sup>

Austin had begun working out a settlement with the caterer, a man named Eager, when Thomas Selfridge, a Federalist lawyer, filed suit on Eager's behalf.<sup>99</sup> Austin claimed that Selfridge had solicited Eager's business (had "sought the case") and that Selfridge had done so in an attempt by the Federalists to publicly embarrass the Republicans.<sup>100</sup> Although a settlement between Austin and Eager ultimately was reached, the dispute between Austin and Selfridge continued.<sup>101</sup> Selfridge eventually approved of the settlement between Eager and Austin, but remained upset with Austin's comments that he had solicited business.<sup>102</sup> Selfridge demanded a public

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<sup>91</sup> *Id.* at 213.

<sup>92</sup> *Id.* at 192, 197.

<sup>93</sup> For the following discussion of Charles' Austin's death and the trial that followed, see Julius J. Marke, *The Case of the Outraged Lawyer*, 2 LITIG. 37, 37-40, 50-51 (1975-1976); Ellis, *supra* note 11, at 218-19.

<sup>94</sup> Marke, *supra* note 93, at 37.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Marke, *supra* note 93, at 37.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 37-38.



apology, but Austin refused.<sup>103</sup> Austin privately admitted that Selfridge had not solicited Eager's business and Austin even went so far as to claim that he had retracted any such previous claims to the contrary.<sup>104</sup> This private acknowledgement was not enough for Selfridge, who wanted a written retraction published in the newspaper.<sup>105</sup>

Austin and Selfridge feuded back and forth verbally until August 4<sup>th</sup>, 1806, when both men posted notices in the local newspapers.<sup>106</sup> Selfridge's notice in the *Boston Gazette* proclaimed his own innocence and charged Austin with circulating "an infamous falsehood concerning my professional conduct," while Austin's notice in the *Independent Chronicle* called Selfridge's notice "insolent and false."<sup>107</sup> Both men offered to their readers proof of the facts behind their notices, but Austin took it a step further and made it known to Thomas Welsh, who had been acting as an intermediary between the two, that Austin "would arrange for 'some person upon a footing with [Selfridge] to take him in hand.'"<sup>108</sup> That person ended up being Austin's own son, Charles.

Charles Austin, a student at Harvard, happened to be in Boston on August 4<sup>th</sup>, the day the postings ran in the paper.<sup>109</sup> After reading the postings, Charles purchased a "strong hickory cane."<sup>110</sup> At midday, Selfridge, who habitually carried a pistol, came upon Charles Austin on his way to the Exchange.<sup>111</sup> Charles struck Selfridge over the head with the cane and Selfridge shot Charles, killing him; "[a]t the trial, who made the first movement never was satisfactorily established."<sup>112</sup>

Selfridge was charged with manslaughter in Charles' death and the trial, which was held at the Supreme Judicial Court on December 23, 1806, took on a highly politicized tone.<sup>113</sup> Four members of the Massachusetts Bar defended Selfridge.<sup>114</sup> Justice Issac Parker, who later became Chief Justice of

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<sup>103</sup> ELLIS, *supra* note 11, at 218–19.

<sup>104</sup> Marke, *supra* note 93, at 38.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> As quoted in *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Marke, *supra* note 93, at 38.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* See also ELLIS, *supra* note 11, at 220–21.

<sup>113</sup> Marke, *supra* note 93, at 38.

<sup>114</sup> ELLIS, *supra* note 11, at 218–19.

the Supreme Judicial Court, presided.<sup>115</sup> Paul Revere served as foreman of the jury.<sup>116</sup> The political overtones were evident and, when Selfridge's attorney Samuel Dexter made his closing argument, he urged the jurors, whether they were "Republican Federalists" or "Democratic Republicans" to forget the political party to which they belonged: "I ask you to forget it; leave all your political opinions behind you..."<sup>117</sup>

After fifteen minutes of jury deliberation, Selfridge was found not guilty.<sup>118</sup> The consensus at the time was that the jury had not put their political opinions behind but, instead, had voted in line with their Federalist majority.<sup>119</sup> As Selfridge noted in 1807 work, 'Soon after the acquittal, mobs and riots infested the town, burning effigies, libelling [sic] jurors and judges, and threatening to murder, etc. These outrages were anticipated by judicious men, in consequence of the wanton publications in the Chronicle and other democratic newspapers.'<sup>120</sup>

Following Selfridge's acquittal, the Republicans saw an upsurge of support and, in 1807, they were successful in capturing the executive branch and both houses of the legislature for the first time in 10 years.<sup>121</sup> With this increase in power, the Radical Republicans began pushing for more law reforms that favored the layperson: arbitration to replace litigation; elected judges, which they believed would be more responsive to the layperson; increased law-making duties for juries, who would be made up of laypersons; and an outcry against the recent Supreme Judicial Court justices' salary increase.<sup>122</sup> The Radical Republicans lost to the Federalists in 1809<sup>123</sup> and by the time the Republicans returned to power in 1811, the Radical wing was fatally weakened and conflict over judicial reform in Massachusetts had been effectively resolved in favor of the Moderates.<sup>124</sup> The Massachusetts movement to replace litigation with arbitration, primarily promoted by the Radical Republicans, had failed. Yet, the triumph of the legal elite was not complete, since arbitration continued, and was strengthened, as a mechanism

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<sup>115</sup> Marke, *supra* note 93, at 38.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 38–40.

<sup>118</sup> ELLIS, *supra* note 11, at 218–19.

<sup>119</sup> Marke, *supra* note 93, at 50–51.

<sup>120</sup> From Thomas O. Selfridge, "A Correct Statement of the Whole Preliminary Controversy [sic] between Tho. O. Selfridge and Benj. Austin," *quoted in* Marke, *supra* note 93, at 50.

<sup>121</sup> ELLIS, *supra* note 11, at 220–21.

<sup>122</sup> *Id.* at 222.

<sup>123</sup> *Id.* at 229.

<sup>124</sup> *Id.* at 229.

of dispute resolution. Benjamin Austin's pamphlet campaign in support of arbitration provides some insight as to the reasons why.

#### IV. AUSTIN'S PAMPHLET CAMPAIGN: A POLARIZED PUBLIC POLICY DEBATE

Benjamin Austin's hostility towards Thomas Selfridge as a Federalist lawyer soliciting litigation is representative of Austin's larger hostility toward the growing legal profession. "Among the multiplicity of evils which we at present suffer," Austin stated, "there are none more justly complained of than those we labour under by the many pernicious practices in the profession of the law."<sup>125</sup> In forming his arguments, Austin made clear that both the study and the practice of law had the potential to be honorable, but that the "order" of lawyers was "endeavouring [sic] to perplex and embarrass every judicial proceeding . . . rendering intricate even the most evident principles of law . . ."<sup>126</sup> By using the term "order," Austin appealed to his readers' understanding of class systems as they had carried over from England and had been incorporated into the societal structures of early America.<sup>127</sup> In the English framework, there were three orders or estates: "the clergy", "the noble or 'gentle'", and "the common people".<sup>128</sup> Americans adopted this language and the ideas behind it, using "the terms 'esquire' and 'gentleman' to describe the members of their landed, mercantile, and professional elites, just as the British did. They too spoke and wrote of the richer or better, middling, and lower, poorer, or inferior 'sorts' or 'classes.'"<sup>129</sup> Yet, America differed from England in that it did not have a "hereditary aristocracy"; instead, it had "a significant urban 'middling sort' engaged in commercial and professional occupations."<sup>130</sup> The Americans also exalted "[t]he ideal of a decent independent 'competency' [which] was attainable by most whites on the freehold family farms that typified much of rural America."<sup>131</sup>

It is this American adaptation of English class structuring that Austin was tapping into in his work. Writing at the time of Shays' Rebellion, when

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<sup>125</sup> Austin 1786, *supra* note 1, at 3.

<sup>126</sup> *Id.* at 4.

<sup>127</sup> KEITH WRIGHTSON, *THE BRITISH ATLANTIC WORLD, 1500–1800*, 146 (David Armitage & Michael J. Braddick, eds., 2002).

<sup>128</sup> *Id.* at 133.

<sup>129</sup> *Id.* at 146.

<sup>130</sup> *Id.* at 147–48.

<sup>131</sup> *Id.*

family farms were most threatened, Austin placed himself firmly in the camp of the agrarians and the Republicans, writing against the elites. Austin repeatedly used the term “order” to describe the legal elite, and he consistently did so in a derogatory way. In England, the terms “order” or “estate” were normative and focused on “the honor or esteem accorded to particular social and economic roles.”<sup>132</sup> In contrast, the term “class” evoked a hierarchical division of society “in terms of broad economic interests groups.”<sup>133</sup> Thus, to Austin’s readers, “order” suggested a group deserving of “honor or esteem,” but Austin’s usage of the term, consistently in quotation marks, suggested his skepticism in applying this definition to the legal profession. Austin’s favored term for the legal profession was the “lawyer class”, which signaled his identification of the legal profession as an “economic interests group.”<sup>134</sup>

Such distinction in terms is in keeping with Austin’s persistent assertions that this order of lawyers purposefully complicated the law for their own professional and economic gain, and his corollary argument that such actions interfered with the layman’s ability to secure justice. According to Austin, “the practice of the law ought not to be within the hands of an ‘order’ of men who pervert [the laws] by their mal practice [sic].”<sup>135</sup> In Austin’s mind, lawyers were using their profession to form an elite class in Massachusetts, which he described as an “aristocratical jurisdiction.”<sup>136</sup>

Austin argued that the order of lawyers sought their own financial gain by manipulating court fees and timelines at the expense of the laypeople they represented. Austin thus described professional lawyers as “needy persons who meant by chicanery and finesse to get a living by their practice,”<sup>137</sup> who were primarily concerned with their fees, and who were only too happy to accept a delay of justice to increase their own profits.<sup>138</sup> He believed that lawyers thwarted the use of extrajudicial dispute resolution, stating that, without the order of lawyers advocating for fee, “[t]he paltry litigious causes amongst neighbors would not exist: Harmony and benevolence would more generally prevail, and agree agreeable to my motto, ‘Mutual passions, mutual charms might lend, And each to each be neighbour, father, friend.’”<sup>139</sup>

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<sup>132</sup> WRIGHTSON, *supra* note 127, at 133–34.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Austin 1786, *supra* note 1, at 34.

<sup>136</sup> *Id.* at 15.

<sup>137</sup> *Id.* at 6.

<sup>138</sup> *Id.* at 6.

<sup>139</sup> *Id.* at 19.

Austin was concerned not only about the “pernicious practice” of law, but also about the growing influence of the professional lawyer class in Massachusetts. He saw the order of lawyers “continually becoming more and more powerful,” inhabiting “every public department.”<sup>140</sup> Austin appealed to the people to ask their legislators to do something about the growing numbers of lawyers.<sup>141</sup> He believed that if citizens did not take action against this order immediately, the people would, in a few years, be removed of the power to do so.<sup>142</sup> As the numbers of the profession grew and lawyers increasingly entered the legislature, Austin suggested requiring that lawyers, like judges and state’s attorneys, be ineligible for the legislature.<sup>143</sup> Austin based his opposition to the legislator-lawyer on the idea that lawyers who served as legislators would craft laws that would be so indefinite as to provide for the lawyer’s own arguments (and indispensability) in later practice.<sup>144</sup> Austin found it “contrary to every principle of propriety to admit men to make laws, who are living upon the practice of them.”<sup>145</sup>

To fight the evils of the rising legal elite, Austin promoted, among other things, voluntary arbitration (described as reference) as an alternative to the courts. He believed that seven-eighths of causes being litigated could have been settled by referees,<sup>146</sup> and he proposed an arbitration system that would be cheaper, faster, and more final than a judgment in court. For example, under Austin’s proposal, disputes would be “settled by the determination of three judicious men” who had “no sinister views” and who met “solely for an amicable settlement of the contest.”<sup>147</sup> Unanimous decisions would be binding on the parties.<sup>148</sup> If parties were allowed to appeal the decision, then the arbitrators’ latest decision would bind.<sup>149</sup>

Austin argued that the attractiveness of such a cheap and speedy system was widespread. He believed that such a system was appropriate to the merchant, the tradesman, the husbandman, and others in society.<sup>150</sup> Ultimately, he wanted to see an almost total replacement of litigation by

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<sup>140</sup> *Id.* at 8.

<sup>141</sup> Austin 1786, *supra* note 1, at 10–11.

<sup>142</sup> *Id.* at 8.

<sup>143</sup> *Id.* at 8–9.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 5. (emphasis omitted)

<sup>147</sup> Austin 1786, *supra* note 1, at 9.

<sup>148</sup> *Id.* at 9, 23, 25.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

arbitration, with only a very few cases settled by judges in court.<sup>151</sup> In situations where a dispute between parties did go to court, Austin proposed that the facts and the evidence should be conveyed directly to the judge and the juries by the parties themselves, without the use of lawyers.<sup>152</sup> He also argued for the use of a fee table to regulate costs and provide for the efficient and final settlement of damages.<sup>153</sup> In keeping with the Constitutional right of counsel and the encouragement of layman involvement in dispute resolution, Austin's proposal allowed individuals to be represented by themselves or by friends who could possibly receive "a small established fee from the Court, similar to a Juryman" to cover costs but he continued to assert that to pay a lawyer who could influence the outcome of the case was nothing less than a bribe.<sup>154</sup> Austin also strongly argued that the use of a lawyer representative by one side deprived the common man on the other side of the ability to represent himself, since he, too, would then feel compelled to hire a lawyer to argue his side of the dispute.<sup>155</sup>

Austin's proposals for legal reform reflected his strong belief in the layperson's ability to know and apply the law: "any man of common abilities can easily distinguish between right and wrong (a trial by Jury is on this principle) more especially when the parties are admitted to give a plain story, without any assistance from lawyers . . ." <sup>156</sup> In this area, as in the rest of his writings, Austin's hostilities were directed more toward the practicing lawyer than the judge. At this time, the bench was still largely occupied by laypersons as the legal elite refused to accept the low pay and circuit riding duties which accompanied the position. Austin believed that judges were not in the same position as lawyers to be persuaded toward bias since they were not paid by the parties for their services and, if the judges were biased or had undue influence or were "perverted" by lawyers, they could be held in check through removal from office and fixed salaries.<sup>157</sup> It was for these reasons that Austin's Radical Republican comrades had promoted an elected judiciary and opposed salary increases. In his writings, Austin asserted that he did not want to abolish any order that would benefit society but that he

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<sup>151</sup> *Id.* at 10.

<sup>152</sup> *Id.* at 5–6, 10.

<sup>153</sup> Austin 1786, *supra* note 1, at 10, 31, 47–49.

<sup>154</sup> *Id.* at 21, 24. The idea of allowing a friend to represent a disputant in court was not unique to Massachusetts. It had its roots in seventeenth-century English Law. See ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA, VOLUME I: THE COLONIAL EXPERIENCE*, 211–212 (University of Oklahoma Press, 1965).

<sup>155</sup> Austin 1786, *supra* note 1, at 18, 20–21.

<sup>156</sup> *Id.* at 19–20.

<sup>157</sup> *Id.* at 33–34.

believed that the present art of lawyering “consists more in the sly art of sophistry, than in genuine principles of fair and unequivocal arguments. The sentiments of law are too generally . . . read by this ‘order’ with a design to warp them to their own purposes and private emolument.”<sup>158</sup>

Through his writings, Austin instructed the people to encourage their legislators to enact the legal reforms and, especially, the system of arbitration he promoted.<sup>159</sup> He attempted to appeal to the people’s ideal of a republican form of government and opposed the “aristocratical jurisdiction” of the lawyer class.<sup>160</sup> When a writer by the name of “Free Republican”, whom Austin suspected was a lawyer and member of the order, seemed “calculated to pave the way for this aristocratical system” by having the “richest class” with “everything at their disposal” rule in such a manner as to “seldom have occasion to go so low as the fourth class for a majority of votes,”<sup>161</sup> Austin advocated again for republican government and protections for the “weak and poor.”<sup>162</sup> Austin believed that the order of lawyers operated on “one grand principle which an aristocratical party would ever wish to inculcate,” which was “to persuade the people, that a few men know the things belonging to their political welfare much better than themselves.”<sup>163</sup>

In promoting his reform measures, Austin was clear that he was not attacking the law itself, which he saw as “necessary for the safety and good order of society,” or individual lawyers, who were “gentlemen of the profession,” but, instead, the pernicious practice of law and “the practitioners of the law as an ‘order’ of men.”<sup>164</sup> In attacking this order of lawyers, Austin appealed to the anti-lawyer hostility that was prevalent at the time, stating that “the community is so greatly incensed against them [the lawyers]” that they have “numberless enemies.”<sup>165</sup> In this regard, Austin saw himself as the voice of many, stating that the order of lawyers was an order of men that “the whole community [was] condemning with one voice.”<sup>166</sup>

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<sup>158</sup> *Id.* at 13. (emphasis omitted)

<sup>159</sup> *Id.* at 5.

<sup>160</sup> *Id.* at 15.

<sup>161</sup> Austin 1786, *supra* note 1, at 28–29. The “fourth class” is a reference to the poorest members of society.

<sup>162</sup> *Id.* at 29.

<sup>163</sup> *Id.* at 45–46.

<sup>164</sup> *Id.* at 3–4.

<sup>165</sup> Austin, *supra* note 1, at 17.

<sup>166</sup> *Id.* at 20. (emphasis omitted)

In the arguments outlined above, it is clear that Austin recognized the increasing numbers and influence of the legal profession.<sup>167</sup> However, he did not seem to apply this information to his discussion of the legislature, except in his efforts to ban lawyers from serving in the assembly. As a result, Austin's appeals to the legislators as representatives of the people did not fully take into account the present strength of the lawyer class within the representative assembly. As the Massachusetts records demonstrate,<sup>168</sup> the very people he appealed to in order to abolish the order of lawyers increasingly became the very people comprising that order.

Austin did, however, address the strength of lawyers in other areas pertinent to his reform proposals. When the Bar acknowledged the evil that was practiced within the order of lawyers and expressed willingness to eradicate that evil while still keeping the order, Austin responded that the evil was too completely entrenched, claiming, "We may think to remedy the evils; but the poison lurks in the very vitals of the 'order'."<sup>169</sup> He recommended a complete abolition of the order and stated that "several towns have given instructions on the important subject of restricting, and, if found necessary, of abolishing the present 'order' of lawyers."<sup>170</sup>

Even as Austin recommended the complete abolition of the order of lawyers, he promoted the study of law at the university level. Although this might seem contradictory from a twenty-first century perspective, it would not have been viewed as so from the antebellum perspective. Austin's arguments against the order of lawyers were focused on professional lawyers who were trained by and admitted to the Bar. In contrast, university education in law would be geared toward the layperson and aspiring lawyer, alike. Such an education in law would provide a foundation for laypersons to know and apply the law, especially in service as arbitrators, jurors, lay counsel, Justices of the Peace, or judges the bench. For that reason, Austin argued that a Professor of Law "should be established and the youth should be early taught the fundamental principles of our laws; and from this knowledge (with small attention) they would become qualified to take the important station of judges."<sup>171</sup> Thus, Austin encouraged the study of the law while still leaving that study accessible to all men, including laypersons who remained outside the formalized legal profession.

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<sup>167</sup> *Id.* at 25, 31.

<sup>168</sup> GAWALT, *supra* note 17, at 67 (Table 8).

<sup>169</sup> Austin 1786, *supra* note 1, at 31.

<sup>170</sup> *Id.* at 45. (emphasis omitted)

<sup>171</sup> *Id.* at 25.



## LOST OPTIONS FOR MUTUAL GAIN

Austin advocated each of these small reforms as stepping stones to his larger purpose, which was to secure cheap and speedy justice for the layperson. To Austin's way of thinking, his larger purpose could be achieved in one of two ways: it could result from the adoption of each of the small reforms he advocated for in his pamphlet campaign, or it could come about through the complete abolition of the order of lawyers and the replacement of litigation in courts with a system of arbitration.

The system of arbitration that Austin promoted had a long history in Anglo-American law, in general, and in Massachusetts, specifically. Massachusetts merchants, of which Austin's father was one,<sup>172</sup> had widely used arbitration prior to the time of Austin's writings.<sup>173</sup> However, throughout the end of the eighteenth century and the beginning of the nineteenth century, the mercantile class had increasingly brought their disputes before the courts.<sup>174</sup> Austin himself was a merchant.<sup>175</sup> He urged his fellow merchants to submit their disputes to arbitration since the order of lawyers was "wholly unacquainted with all mercantile concerns," but his efforts to persuade his fellow merchants to join him in supporting arbitration were fruitless.<sup>176</sup>

An exchange between Austin and a writer by the name of "Merchant" highlights this point well. Merchant countered Austin's calls for arbitration by asserting the right of the existence of a professional order of lawyers.<sup>177</sup> Merchant believed that abolishing the order of lawyers would lead to a decline in learned judges.<sup>178</sup> Merchant described the order of lawyers as a "learned profession, which embraces more extensive branches of science than any other" and argued that to abolish the order of lawyers would mean the decline of education as a whole.<sup>179</sup> Thus, Merchant's main focus was on the merchants' need for learned lawyers and judges who would know and rightly apply mercantile law.

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<sup>172</sup> *Id.* at 52.

<sup>173</sup> HORWITZ, *supra* note 71, at 145–46. Horwitz describes the merchants' attitudes toward arbitration and litigation in early America, but the context of Austin's campaign and the dispute resolution reforms enacted in Massachusetts suggest that Horwitz's larger thesis of an alliance between the judges, lawyers, and merchants and the triumph of the legal profession over arbitration did not occur in antebellum Massachusetts.

<sup>174</sup> *Id.*

<sup>175</sup> ELLIS, *supra* note 11, at 260.

<sup>176</sup> Austin 1786, *supra* note 1, at 5.

<sup>177</sup> *Id.* at 15.

<sup>178</sup> *Id.* at 20.

<sup>179</sup> *Id.*

Austin answered Merchant's criticisms by stating that getting rid of the lawyers would simplify the law and that the judiciary would continue to be learned since, in light of his proposals for university level education in law, any "gentlemen [sic] of leisure and abilities" (i.e., men who had the time, money, and capacity to complete a university education) could be a qualified judge."<sup>180</sup> Austin further stated that abolishing the order of lawyers would improve real education and do away with "sophistry" since, in his opinion, the order did nothing to serve religion, duly execute law, enlarge commerce, improve agriculture, or encourage manufacturing.<sup>181</sup> When Merchant cited concern over the increased number of cases on court dockets, Austin answered that the cases were not evidence of the need for lawyers but, instead, evidence of the "danger . . . from that 'order' whose existence depends on this public distress."<sup>182</sup> In contrast to the courts, where lawyers encouraged conflict and complex litigation to fund their work, Austin promoted binding decisions by arbitrators, which he believed would resolve the need to litigate in the first place.<sup>183</sup> Perhaps sensing a lack of support within his own merchant class, Austin criticized merchants whom he believed had "become so infatuated as to place such causes in the hands of lawyers." He included himself in his statement that, "by our own folly we subject ourselves to the costs of court, lawyers['] fees, [etc.]."<sup>184</sup>

Merchant's response to Austin's proposals reflected a broad change that had begun occurring within the merchant class since the colonial period and that continued to occur after the Revolution. During the colonial period, the merchants were a largely middle class group who widely employed arbitration.<sup>185</sup> Merchants did not choose arbitration out of anti-lawyer sentimentality.<sup>186</sup> Instead, the merchants used arbitration as a more economical, informal, and efficient means of resolving their disputes.<sup>187</sup> When merchants did speak in favor of arbitration and against the legal establishment, they did so as a means to continue to control their own methods of dispute resolution, which were based on the commercial customs

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<sup>180</sup> *Id.* at 20, 25.

<sup>181</sup> *Id.* at 20–21.

<sup>182</sup> Austin 1786, *supra* note 1, at 20.

<sup>183</sup> *Id.* at 5, 9, 25.

<sup>184</sup> *Id.* at 9.

<sup>185</sup> HORWITZ, *supra* note 71, at 145 (citing W.C. Jones, "Three Centuries of Commercial Arbitration in New York: A Brief Survey," 1956 Wash. U. L. REV. 193 (1956); SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674–1784, 44–45, 551–65 (R. Morris ed., 1935)).

<sup>186</sup> *Id.* at 146.

<sup>187</sup> *Id.* at 145.

of their day.<sup>188</sup> The merchants saw arbitration as a commercial-friendly way to protect their interests in an era in which the judiciary neither adequately understood mercantile law nor was disposed to rule in favor of merchant claims.<sup>189</sup> As reflected in a 1792 lecture on the law by United States Supreme Court Justice James Wilson, the lawyers' lack of familiarity with commercial transactions made arbitration and the use of a commercial court attractive means to resolve mercantile disputes.<sup>190</sup> Therefore, anti-lawyer sentiment in the merchant class tended to stem not from the creation of an "order" of lawyers or a legal elite, but from the very practical fact that the legal establishment of the time seemed wholly inadequate to resolve mercantile disputes in an efficient and economical manner. Since the merchants were not practicing arbitration out of any widespread hostility toward the legal elite per se, Austin's appeals based on anti-lawyer sentiment failed to persuade them.

In spite of this failure, Austin did recognize the merchants' discontent with the legal system, and he sought to appeal to the merchants on the grounds that arbitration was cheaper, speedier, and provided outcomes that were more consistent with the developing mercantile law. In this line of appeal, Austin argued that lawyers were "wholly unacquainted with all mercantile concerns" and that using lawyers only increased mercantile costs and fees.<sup>191</sup> He encouraged merchants to use a system of arbitration that would consist of three merchants who would know mercantile law.<sup>192</sup> Although this line of argumentation came much closer to addressing the true sentiment of the merchant class, it did not go far enough.

The eighteenth century commercial class in America consisted of businessmen such as lawyers, bankers, merchants, and market-oriented farmers who lived in the cities and coastal farming communities and who were a part of the market economy.<sup>193</sup> Although merchants favored the use of arbitration in the mid-eighteenth century, by the end of the century, the judicial establishment had begun to persuade merchants that it could adequately, competently, and favorably resolve their disputes.<sup>194</sup>

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<sup>188</sup> AUERBACH, *supra* note 7, at 5.

<sup>189</sup> HORWITZ, *supra* note 71, at 146-47.

<sup>190</sup> *Id.* at 148 (citing 1 THE WORKS OF JAMES WILSON 279 at 488-92 (R. McCloskey ed. 1967)).

<sup>191</sup> Austin 1786, *supra* note 1, at 5.

<sup>192</sup> *Id.* at 9.

<sup>193</sup> ELLIS, *supra* note 11, at 256.

<sup>194</sup> AUERBACH, *supra* note 7, at 32-33.

Several things happened to promote this change in the relationship between the merchants and the legal establishment from the late eighteenth century through the beginning of the nineteenth century. First, the Massachusetts economy was in a depression during the 1780s but hit upon a great economic expansion in the 1790s which, over the next forty years, transformed Massachusetts from an agrarian economy to an industrialized market economy that required new legal rules.<sup>195</sup> This expansion may have helped relieve some of the anti-lawyer hostility exhibited by the debtor class through Shays' Rebellion in 1786. Second, debtor and creditor rules were revised to better suit the needs of the commercial marketplace.<sup>196</sup> Third, the Bar, which had been led by debt collectors and land conveyancers prior to 1790, was, after that time, led by commercial lawyers who began to overthrow the anti-commercial legal doctrines of the eighteenth century.<sup>197</sup> The merchants began to see the judicial system become more favorably disposed to rule in their favor.<sup>198</sup>

By the end of the eighteenth century, not only was the legal system beginning to adequately address the needs of the commercial classes, but also so many lawyers were needed to represent the merchants in court that some legal professionals had begun specializing in commercial litigation.<sup>199</sup> In the same time period, the mercantile community became increasingly diverse.<sup>200</sup> This increasing diversity and size of the mercantile community may have had a weakening effect upon the community interest of resolving merchant disputes through arbitration.<sup>201</sup> As Eben Moglen states,

[I]ncreasing economic specialization separated the commercial class into several smaller groups with distinct interests: insurers and insureds, bankers and merchants. The neutrality of arbitrators chosen from within the

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<sup>195</sup> NELSON, *supra* note 32, at 146–47.

<sup>196</sup> *Id.* at 147.

<sup>197</sup> HORWITZ, *supra* note 71, at 140.

<sup>198</sup> *Id.* at 154–55.

<sup>199</sup> HORWITZ, *supra* note 71, at 140.

<sup>200</sup> Moglen, *supra* note 13, at 149. Moglen's account highlights the type of changes in merchant use of arbitration that Austin seems to be addressing in his pamphlet, while also offering a corrective to Horwitz's conclusion that arbitration ceased to exist as a viable dispute resolution model as a result of the judges' and lawyers' success in convincing the merchant class to come to litigation instead of arbitration. *See also*, Jones, *supra* note 13 (arguing for arbitration in New York throughout early America).

<sup>201</sup> *Id.* at 152.

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community may have become less credible, thus giving rise to a desire with the commercial class for a cadre of professional judges and advocates.<sup>202</sup>

Reflecting both the professionalization of the law and this dual interest of lawyers and merchants in the consistent resolution of commercial disputes, the American Law Journal began publishing commercial law decisions in 1808 in order to inform the merchants of the law.<sup>203</sup> Although Austin's pamphlet campaign and Massachusetts statutory reforms make it clear that arbitration continued as a form of dispute resolution, even among merchants, what is also clear is that, from 1790 to 1820, the merchants had largely set aside any notions of anti-legalism they may have harbored during the colonial and revolutionary period.<sup>204</sup>

This change in the commercial class in Massachusetts had an impact on the more partisan attempts to reform the law. Antebellum Massachusetts was fairly commercialized, with a strong population of Moderates in Boston, Salem, and the more populated coastal areas and a weaker Radical representation among the less commercially-oriented farmers.<sup>205</sup> Members of the merchant class were the foundational supporters of Moderate legal reform precisely because that method of reform protected the growing business community's need for a more rational, standardized law that was not as subject to local prejudices.<sup>206</sup> In promoting Radical reform in Massachusetts in the 1780s, the reformers did not take into account the critical need to appeal to their opponents' economic interests.<sup>207</sup> Although Austin attempted to appeal to the merchants' economic interests by advocating for a cheap and speedy method of arbitration, he did not give enough weight to their economic and efficiency interests in a more rational, standardized rule of law. Thus, Austin reflected a wider failure among reformers of his day in neglecting to promote a program which would appeal to all groups in the state<sup>208</sup>—not only the general interest in cheap and speedy dispute resolution and the laypersons' interests in knowing and applying the law, but also the merchants' interest in certainty of legal rules

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<sup>202</sup> *Id.*

<sup>203</sup> HORWITZ, *supra* note 71, at 141.

<sup>204</sup> *Id.* at 140.

<sup>205</sup> ELLIS, *supra* note 11, at 258 (citing PAUL GOODMAN, *DEMOCRATIC-REPUBLICANS OF MASSACHUSETTS* 70–127 (1964)).

<sup>206</sup> *Id.* at 156 (citing JAMES WILLARD HUNT, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1967); R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 56–88 (1968)).

<sup>207</sup> NELSON, *supra* note 32, at 71.

<sup>208</sup> *Id.*

and outcomes and the general interest in legal decisionmakers (judges, juries, and legislators) who had the training necessary to know and apply the law. By failing to promote a program that would appeal to all groups in the state, Austin failed to gather the consensus and support necessary to persuade and succeed in his reform efforts.<sup>209</sup> Austin himself seemed to concede to his own inability to do so, stating:

The observations offered are solely intended for the public good; . . . Each individual will judge on the subject; if my principles are approved, let them be adopted with resolution, by giving instructions to our Representatives; [*B*]ut if we are willing to submit to the 'order' and bow down under the practice, as an individual I must acquiesce in the determination of my countrymen.<sup>210</sup>

And acquiesce he did. After the War of 1812, anti-lawyer attacks by laypersons, such as those promoted by Austin, did not cease completely, but instead became utterly ineffective in light of the growing prestige of the legal profession.<sup>211</sup> The ceasefire in argumentation also may have been the outworking of politics: the mid-1810s saw an "Era of Good Feelings" in which business expanded, the standard of living increased, and political harmony ruled for a time.<sup>212</sup> Although Austin's 1786 letters were reprinted in response to popular request in 1814<sup>213</sup> and 1819<sup>214</sup> he himself diluted their radical, anti-lawyer appeal by including a "Prefatory Address to Candid Readers. Never Before Published" which began with this quotation, a far cry from the anti-lawyer sentiment of his original campaign:

What solid Joy is it, for a virtuous man, in the practice of the law, to think he has received a talent from God which makes him the sanctuary of the

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<sup>209</sup> *Id.*

<sup>210</sup> Austin, *supra* note 1, at 12 (italics added; additional emphasis omitted).

<sup>211</sup> BLOOMFIELD, *supra* note 5, at 59.

<sup>212</sup> *Id.*

<sup>213</sup> Benjamin Austin, *Observations on the Pernicious Practice of the Law As Published Occasionally in the Independent Chronicle* (Belcher, 1814), microformed on Early Am. Imprints, Ser. II no. 30716, 43116, 31753 (AM. HIST. IMPRINTS) [hereinafter Austin 1814].

<sup>214</sup> Benjamin Austin, *Observations on the Pernicious Practice of the Law As Published Occasionally in the Independent Chronicle* (True & Weston, 1819), microformed on Early Am. Imprints, Ser. II no. 47029 (AM. HIST. IMPRINTS) [hereinafter Austin 1819].

unfortunate, the protector of justice, and enables him to defend the lives, fortunes, and honour of his countrymen.—Rollin.<sup>215</sup>

# V. AUSTIN'S ULTIMATE GOAL: CHEAP AND SPEEDY ACCESS TO JUSTICE

In his prefatory comments to the 1814 edition of his pamphlet, Austin stated that in the nearly twenty years that had elapsed since his pamphlet was first printed, “the practice within the [B]ar, has become more congenial to the happiness of society” and that he therefore “acknowledges the utility of the profession, when conducted upon those honorary principles which give lustre to science.”<sup>216</sup> Far from his previous calls to abolish the order, Austin stated that he wished to place the “order” of lawyers in a respectable and learned rank of society.<sup>217</sup>

Perhaps the most surprising aspect of the Prefatory Address is Austin's claim that he never intended to promote “annihilation of the ‘order’” (although he admits that it was “frequently mentioned in the foregoing numbers”) but that he meant merely to regulate the legal establishment.<sup>218</sup> He then went on to say that, in his previous writings, his sole purpose was only to object to “the pernicious practice of certain individuals within the Bar” while encouraging “the purity which ought to constitute a Court of Justice.”<sup>219</sup>

If Austin's 1814 comments seem in stark contrast to his arguments of 1786, it is because they are. In the time that elapsed between his original writings in 1786 and the reprinting of those arguments in 1814, Austin had switched from acknowledging a few honorable lawyers while decrying the rise of the legal elite as a whole and recommending its abolition through the triumph of arbitration, to criticizing only certain dishonorable individual lawyers while applauding the rise of the legal profession, recommending the order's appropriate status in society, and abandoning the triumph of arbitration. To smooth over his dramatic departure from his previous position, Austin stated in his Prefatory Address that he was pleased with “the happy reverse of the *present practice*” and, while acknowledging the anti-lawyer sentiment in his previous publications, stated that it was only through

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<sup>215</sup> Austin 1814, *supra* note 213, at 61.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 62–63.

<sup>219</sup> *Id.* at 63. (emphasis omitted)

“[r]elying on the liberality of all classes of readers (not excepting the gentlemen of the Bar)” that he was “willing to submit his sentiments to their candid perusal”, in “original publication” form, in the 1814 reissue.<sup>220</sup>

What can account for Austin’s reversal? Austin himself attributed his reversal to changes in the practice of the law that had made the securing of justice by laypersons more simple and efficient. According to Austin, as of 1814, there were no longer “unreasonable delays” or “illegal charges” and *all classes* could now appeal to the law with confidence: “[L]aw and justice are synonymous.”<sup>221</sup> He recognized that practices of complexity, high fees, and delay, which he had formerly decried, could creep back in, but he believed that a remedy remained: “[I]f the same impositions, within the [B]ar, are now continued, as were practised by some at the period when the foregoing numbers were written, [then] that the same mode of legislative procedure ought to be adopted as was then recommended.”<sup>222</sup> The “legislative procedure” that Austin is referring to here is the piecemeal adoption, by the legislature, of many of the legal reforms he had argued for in his 1786 campaign, including a statutory form of binding arbitration.<sup>223</sup> Thus, while still affirming the proposals he had submitted in 1786, Austin’s 1814 comments suggest that he, like his fellow merchants, had found that the community’s justice needs could be met within the developing legal system and, as a result, he no longer felt the need to advocate for the almost sole system of binding arbitration he had once so ardently promoted.

Austin had based his pro-arbitration arguments on anti-elite, anti-lawyer sentiment when the merchants’ true disagreements with the legal system stemmed not from anti-elitism, but from the fact that both the lawyers and the early American legal system were struggling to keep pace with rapidly-developing mercantile law, which resulted in decisions that were unjust. As lawyers and judges proved themselves capable of handing down efficient and consistent commercial decisions, the merchants lost one of their most compelling reasons for submitting to arbitration in the first place.

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<sup>220</sup> *Id.* (emphasis in original). Austin’s statement here is puzzling since the 1814 version has quite a few alterations when compared to the 1786 original.

<sup>221</sup> *Id.* at 62. (emphasis in original)

<sup>222</sup> *Id.* (emphasis in original).

<sup>223</sup> Austin also may be referring to changes made within the Bar association, itself, as the Bar association’s revised standards for admissions and training led to a more ethical and trained class of attorneys. In other words, Austin would not need to advocate so strongly for layperson representation and methods of dispute resolution in 1814 if lawyers had ceased to practice law in ways that he believed subverted justice. See CHROUST, *supra* note 154, at 330–34.



In order to gain the support of the merchant class, Austin needed to propose a system of arbitration that would be able to meet the merchants' needs for rational, standardized decisions on law outside of court better than the rising legal profession could meet those needs through representation in litigation. This he failed to do. By basing his arbitration proposals so strongly on anti-lawyer sentiment and failing to promote an arbitration structure and system that would address the more practical needs of the diverse merchant community, Austin lost the support of the previous merchant practitioners of arbitration and, eventually, failed to persuade even himself to adopt his proposals for a nearly exclusive system of arbitration.

But merchants were not Austin's only audience, and the replacement of litigation with arbitration was not Austin's ultimate goal. Austin's ultimate goal was to secure cheap and speedy access to justice for all citizens and, as the introductory comments to the 1814 republication of his pamphlet campaign suggest, this goal was met through law reforms that took place between 1786–1814—law reforms that included the legislative creation of a statutory system of arbitration to go alongside the common law arbitration that already existed.

For example, in addition to the 1786 Acts seeking to limit litigation in personal and real actions,<sup>224</sup> the General Court also passed more substantial reform with “An Act for Rendering Processes in Law Less Expensive.”<sup>225</sup> As stated in the preamble, the Act was intended to fulfill the legislature’s “duty . . . to provide means, whereby the decision of civil causes should be as speedy, and attended with as little expense to the Citizens of this Commonwealth, as the nature of things will admit.”<sup>226</sup> The legislature sought to provide such means in a variety of ways. First, the Act extended the jurisdiction of the Justices of the Peace over cases “triable by the common or statute laws” except for cases determining real estate title.<sup>227</sup> The Act required that all civil actions valued at over four pounds go through the Justice of the Peace before being “cognizable in the Courts of Common Pleas.”<sup>228</sup> Related to this requirement was the Act’s overt encouragement of

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<sup>224</sup> *Limitation of Personal Actions*, *supra* note 67; *Limitation of Real Actions*, *supra* note 67.

<sup>225</sup> *An Act for Law Less Expensive*, *supra* note 68, at 105.

<sup>226</sup> *Id.*

<sup>227</sup> *An Act for Law Less Expensive*, *supra* note 68, at 106. In this time period, the Acts and Resolves of Massachusetts are riddled with exceptions for cases involving titles to real estate, and the exceptions suggest an overarching policy of securing surety of title as expeditiously and with as much finality as possible. See The State Library of Massachusetts Electronic Repository, *available at* <http://archives.lib.state.ma.us/>.

<sup>228</sup> *Id.* at 111.

arbitration (described here as “reference”). According to the Act, if a defendant were to appear before the Justice of the Peace and dispute the claim at hand, the Justice:

shall use his best endeavors, to induce the parties to a reference of such dispute or demand; and in case the parties agree to refer such dispute or demand, and agree on the persons to determine the same; the referees shall have the same power, and the same proceedings shall be had thereon, in all respects, as is pointed out by an Act passed the present year, entitled, “An Act for rendering the decision of civil causes, as speedy and as little expensive as possible . . . .”<sup>229</sup>

Thus, the Act encouraged disputants to submit to arbitration even before entering their disputes before the Court of Common Pleas. If the parties did not agree to submit to arbitration, then the parties could pursue a trial at the Court of Common Pleas.<sup>230</sup> Even then, the Act sought to limit the role of attorneys and even the playing field between the parties by limiting representation in court to “but one Attorney . . . on either side”.<sup>231</sup>

The “Act passed the present year”, which is referred to in the above statute, was “An Act for Rendering the Decision of Civil Causes, as Speedy, and as Little Expensive as Possible,” passed by the General Court in May Session, 1786 and known as the Referee Act.<sup>232</sup> The Referee Act provided for a forum through which parties in dispute (“a dispute of what nature soever [sic]”) could agree to submit their dispute to reference to be determined by three referees of their choosing.<sup>233</sup> The report of the referees then would be submitted to the Court of Common Pleas and would be given the same weight and authority as if the report “had been made by referees appointed by a rule of the same Court.”<sup>234</sup> Furthermore, the Act provided that:

[The referees] shall be vested with all the authority and power that referees have been, or may hereafter be vested with, who have been, or shall be appointed by a rule of Court. And witnesses shall be summoned to appear before them and sworn, in the same manner as is or may be prescribed by

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<sup>229</sup> *Id.* at 109.

<sup>230</sup> *Id.* at 110.

<sup>231</sup> *Id.* at 111.

<sup>232</sup> 1786 Referee Act, *supra* note 68, at 55.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 56.

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Law for summoning witnesses before referees appointed by a rule of Court as aforesaid.<sup>235</sup>

Thus, the Referee Act of 1786 made voluntary reference to arbitration, the authority of the parties' chosen arbitrators, and the validity of their award, as final as they would have been had the parties first appeared before the Court of Common Pleas and had their dispute submitted to reference as a rule of the Court. In so recognizing and affirming voluntary submission to arbitration and the parties' selection of arbitrators, the General Court extended, in practical terms, the dispute resolution options available to the parties while also discouraging the continuance of their litigation. In addition, the legislature continually affirmed this model of arbitration in the years that followed. In 1836 the General Court revised all of the statutes of Massachusetts in existence at that time, passing "An Act to repeal expressly all the Acts which are consolidated in the Revised Statutes."<sup>236</sup> Although the Repealing Act contained 70 pages of specific repeals, categorized by year, the Referee Act remained standing and appeared in the Revised Statutes of 1836 in substantially the same form as it appeared in the 1786 original.<sup>237</sup>

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<sup>235</sup> *Id.* at 57.

<sup>236</sup> See *An Act to repeal expressly all the Acts which are consolidated in the Revised Statutes General Court*, 1836 MASS. ACTS 582–651, available at The State Library of Massachusetts Electronic Repository, <http://archives.lib.state.ma.us/> (hereinafter *1836 Repealing Act*).

<sup>237</sup> *Revised Statutes of 1836*, MASS. REV. STAT ch. 114 (1836), available at the State Library of Massachusetts, <http://www.archive.org/details/revisedstatutes00mass> (hereinafter, *Revised Statutes*). The version as it appeared in 1836 was titled, "Of Reference to Arbitration by Agreement Before a Justice of the Peace" and cited to portions of the *1786 Referee Act* in the marginal notes. The 1836 revision replaced the term "reference" with the term "arbitration" and allowed for more variance from the statutory procedures, if agreed to by the parties. *Id.* The statutory language states: "No appeal shall be allowed from any order or judgment of the court of common pleas, upon any award made under this chapter, but any party, aggrieved by such judgment, may bring a writ of error, for any error in law or fact, as in other cases, and the supreme judicial court shall thereupon render such judgment, as the court of common pleas ought to have rendered." *Id.* The replacement of "reference" with "arbitration" was likely in recognition that reference and arbitration, while often used synonymously, had distinct meanings: "[reference] relates to a mode of determining questions which is distinguished from 'arbitration,' in that the latter word imports submission of a controversy without any lawsuit having been brought, while 'reference' imports a lawsuit pending, and an issue framed or question raised which (and not the controversy itself) is sent out. Thus arbitration is resorted to instead of any judicial proceeding; while reference is one mode of decision employed in the course of a judicial proceeding." See "refer" in BLACK'S LAW DICTIONARY, *supra* note 45, at 1005.

The Massachusetts State Statutes were again revised in 1860, resulting in the General Statutes of 1860. Once again, the substance of the 1786 Referee Act was incorporated into the statutory revisions, signaling a legislative commitment to uphold voluntary submission to arbitration as a method of dispute resolution.<sup>238</sup>

The legislature was not the only branch of government to enact reform. The Supreme Judicial Court enacted its own reforms and, as a result, “streamlined procedure, shortened trials, cleared the dockets, raised the professional level of the [B]ar, maintained decorum in the courtroom, and in general made the administration of justice more prompt and less expensive than it had been.”<sup>239</sup> With these reforms, it would seem that Austin’s ultimate goal of cheap and speedy access to justice had been realized.

## VI. IMPLICATIONS FOR DISPUTE RESOLUTION IN AMERICAN HISTORY

When viewed in its larger historical context, Austin’s pamphlet campaign reveals the richness of common law and statutory law arbitration in the antebellum period, highlights the robust nature of American state-level statutory arbitration prior to the 1925 Federal Arbitration Act, and demonstrates the continuity of motives for and methods of dispute resolution across American history.

First, Austin’s pamphlet campaign, and the context in which it was written, serves as a corrective to a prominent story in the legal history of arbitration in America, which is that common law arbitration thrived in early American but was eliminated as a viable option for dispute resolution by judges and lawyers who passed statutes to regulate arbitration, and then used those statutes to regulate arbitration out of existence.<sup>240</sup> The key players in this account are the judges, who actively seek to bring the merchants into

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<sup>238</sup> *Of Reference to Arbitration by Agreement before a Justice of the Peace*, MASS. GEN. LAWS ch. 147, (1860), available at The State Library of Massachusetts Electronic Repository, <http://archive.org/stream/generalstatutesof1860mass#page/748/mode/2up>, citing to the Revised Statutes of 1836, Chapter 114 (which then refers to the statutes of 1786 Chapter 21, the *Referee Act*). Note: Where the Revised Statutes of 1836 allowed for no appeal except on “a writ of error for any error in law or fact as in other cases” the General Statutes of 1860 upheld this same language while adding in the right to appeal for an error in a matter of law on the face of the record. *Id.* Such language tracks the development of appeal for apparent error in law on the face of the award in other jurisdictions.

<sup>239</sup> ELLIS, *supra* note 11, at 229.

<sup>240</sup> See generally, HORWITZ, *supra* note 71.

court, and the merchants, who willingly turn from arbitration to litigation as judges became better equipped to handle commercial disputes.<sup>241</sup>

What we see in Austin's pamphlet campaign, however, is a twist on this older story. The merchants were wary of courtrooms where judges seemed neither to know, nor to rightly apply, mercantile law. But the merchants themselves were in disagreement about where such wariness should take them. Austin's literary opponent, "Merchant," argued for disputants to pursue litigation with "learned" judges and lawyers,<sup>242</sup> while Austin argued for disputants to turn to arbitration with "learned" laypersons. Both men argued for dispute resolution systems that would be efficient and economical. Thus, the dispute between "Merchant" and Austin was primarily a dispute about how best to resolve conflict between merchants, and only secondarily about which dispute resolution method—arbitration or litigation—would best meet that interest. They agreed on their larger goal, which was for merchants to have a cheap, efficient, and effective method of dispute resolution by individuals who would know and rightly apply the mercantile law. Far from eliminating arbitration or creating a system solely of litigation (the extreme positions of each side), the piecemeal reforms that happened in the wake of Austin's pamphlet campaign retained the judiciary while encouraging the layperson's continued role in legal decisionmaking through common law arbitration, statutory arbitration, and reference by rule of the court.

Furthermore, Austin had promoted a statutory form of arbitration as a way to encourage and increase the use of arbitration as a whole. While it has been claimed that early American arbitration statutes were created and then used in order to interpret common law arbitration out of existence,<sup>243</sup> Austin's own later writings suggest just the opposite. In fact, by 1814, Austin ceased to promote a system of arbitration to replace litigation not because he had been defeated or because the legal elites had triumphed, but because his larger goals for legal reform had been achieved. Austin no longer saw the lawyer as a barrier to cheap and speedy justice, and therefore, he no longer saw a need to oppose a dispute resolution model—litigation—in which lawyers would be present. Austin no longer saw the lawyer as a barrier because, as he proclaimed, the "pernicious" practices that had plagued the practice of law had ceased; the legal profession had regulated itself, most notably through piecemeal reforms passed between 1786 and 1814. The

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<sup>241</sup> *Id.*

<sup>242</sup> Austin 1786, *supra* note 1, at 20.

<sup>243</sup> HORWITZ, *supra* note 71, at 140–60. For a contrasting history, see generally Conklin, *supra* note 13 (demonstrating that judges in New Jersey and Kentucky consistently upheld arbitration procedures and awards throughout the antebellum period).

result was a dispute resolution system in which common law arbitration, statutory arbitration, reference, and litigation all coexisted as dispute resolution options for Massachusetts disputants. In short, arguments in favor of arbitration were robust in the antebellum era, as were the systems of arbitration that were used and promoted. Hostility toward legal elitism was not hostility towards all lawyers or all individuals involved in legal professions. Indeed, respect for the position of judge, legislator, and Justice of the Peace continued and grew, even as lawyers increasingly inhabited these roles. Even polarized arguments, such as those employed by Austin in his 1786 pamphlet campaign, did not result in polarized, win/lose outcomes: litigation remained . . . as did common law arbitration and reference by rule of the court. Statutory arbitration was added to the mix. As a result, early Americans altered the use of arbitration as it had existed in the colonies, but they did not eliminate it in favor of litigation. In other words, there was no triumph of the legal profession over layperson involvement in dispute resolution.

At the same time, there was no triumph of arbitration over the legal profession either. A second key implication of Austin's pamphlet campaign is the way in which it acts as a corrective to the history of arbitration in America. Discussions of the history of arbitration tend to begin, in earnest, with the passage of the Federal Arbitration Act in 1925, with a few references to earlier arbitration models. But my research suggests that the history of arbitration in America begins centuries earlier. The earliest forms of American arbitration mirrored English arbitration as it had existed under common law and in parliamentary statutes. An English Dictionary from 1684 includes the definition of an arbitrator as "an extraordinary Judge in one or more Causes between party and party, chosen by their mutual consents . . . who likewise divideth *Arbitrement* into general, that is, including all Actions, Quarrels, Executions and Demands and especial which is of one or more Matters, Facts, or Things specified."<sup>244</sup> The Award or Determination of the arbitrators was called an "Arbitrement" and followed the format that would later be seen in early American arbitration.<sup>245</sup> Blackstone included this same 1684 framework for arbitration in his *Commentaries on the Laws of England* (1765-1769), which went on to become the most popularly consulted law

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<sup>244</sup> JOHN COWEL, NOMOTHETES, THE INTERPRETER 17 (1684) ("arbitrator"). Available through HeinOnline Legal Classics Library.

<sup>245</sup> *Id.* ("artitrement").

book in colonial and early America.<sup>246</sup> In Chapter 1 of Book III on Private Wrongs, Blackstone defined arbitration as follows:

Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrongs, to the judgment of two or more *arbitrators* who are to decide the controversy . . . . This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties of the judgment of the court of justice. . . . And experience having shewn [sic] the great use of these peaceable and domestic tribunals . . . the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought, and which still depend upon the rules of the common law. . . .<sup>247</sup>

As highlighted by Blackstone, arbitration in the Anglo-American world took on a variety of forms, each of which was categorized by the timing of the submission and enforcement of the award.<sup>248</sup> Common law arbitration involved the parties in dispute voluntarily submitting their dispute to arbitrators for resolution, typically prior to any action in court. The agreement to submit to arbitration might be by word or deed, and the award was binding on the parties inasmuch as an oral or written agreement would be binding. As a result, parties in dispute would then need to seek court action if there were any disagreements regarding enforcement of the award. The common law also allowed parties in dispute to submit to arbitration after

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<sup>246</sup> Julius S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 451–457 (David Flaherty ed., 1969).

<sup>247</sup> 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*16–17. If the parties had previously gone to arbitration in resolution of a claim, the plaintiff could not then bring action in a court of law. *See id.* at 306. Blackstone's definition of arbitration is similar to that included in RICHARD BURN, *A NEW LAW DICTIONARY* 45–51 (1792). *See also* the similarities between the forms outlined here and the forms outlined in the Massachusetts *Referee Act* of 1786. For even later similarities, *see also* "Arbitrator" and "Award" in JOSHUA MONTEFIORE, *A COMMERCIAL DICTIONARY* (1803).

<sup>248</sup> For a discussion of the history of arbitration in English common law and acts of Parliament, *see* Conklin, *supra* note 13, at 79 n.253. Some early American communities also saw a dispute resolution model that looks like today's Mediation-Arbitration hybrid; the parties would first submit to mediation by authoritative members of the community. If that failed, the parties would submit to a dispute resolution similar to binding arbitration. A terrific example of the American adoption of a Mediation-Arbitration hybrid would be the dispute resolution model adopted by the Quakers within their own communities. Portions of this model were also incorporated into New Jersey's later arbitration legislation. Conklin, *supra* note 13, at 69–96.

action in court was already pending. This type of arbitration is most commonly called reference or reference by rule (order) of the court. In reference by rule of the court, the arbitration award (most often called the referees' report) would be submitted to the court, where it would be entered and enforceable as a judgment of the court.

Where common law arbitration followed guidelines outlined in the common law and upheld by common law judges, statutory arbitration followed a complimentary, but distinguishable set of guidelines laid out by statute.<sup>249</sup> Statutes differed from state-to-state, but generally allowed for one or both of the types of arbitration available at the common law, albeit with more detailed requirements for submission, process, and award.<sup>250</sup> Thus, statutory arbitration might allow the parties in dispute voluntarily to submit their dispute to arbitrators prior to action in court and the arbitrators' award then would be entered and enforceable as a judgment of the court, as dictated by the terms of the statute. Statutory arbitration might also allow arbitration to be initiated after the parties in a dispute had initiated action in court. The decision to submit the dispute to arbitration could be through the parties' voluntary choice, encouragement of the court, court order, or any combination of the three. After the dispute had been referred to arbitration, the award of the arbitrators would be entered as an order of the court and would be enforceable against the parties. Thus, statutory arbitration complimented the forms of arbitration already available at the common law.

Throughout the late-eighteenth and nineteenth centuries, common law arbitration continued to exist in America alongside the statutory forms of arbitration that were beginning to be passed by the new American states.<sup>251</sup> In fact, these same distinctions continued to be highlighted by Henry Campbell Black in his 1910 version of "A Law Dictionary Containing

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<sup>249</sup> Sturges, *supra* note 71, at 819–20.

<sup>250</sup> *Id.*

<sup>251</sup> While it has been argued that the requirements of statutory arbitration, in purpose or practice, were utilized by judges to drive arbitration out of existence, contrasting research shows a co-existence and mutual affirmation of common law and statutory models of arbitration in the antebellum period and as late as the mid-twentieth century. For a discussion of the decline of arbitration in the antebellum period, *see generally* HORWITZ, *supra* note 71. For a discussion of the robust nature of arbitration in the antebellum period, *see generally* Conklin, *supra* note 13. For a thorough discussion of common law and statutory arbitration as they continued to exist in twentieth century America, *see generally* Sturges, *supra* note 71.



Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern"<sup>252</sup>

When Austin assumed the existence of common law arbitration and appealed to his readers to lobby the legislators for a statutory form of arbitration, he was mirroring the common law and statutory forms of arbitration that were already in place in the English legal tradition.<sup>253</sup> That Austin was drawing on English precedent for arbitration is persuasive in light of the other forms of English precedent upon which he draws in his pamphlet campaign. For example, Austin argued strongly for professors of law at the undergraduate level who can teach "the fundamental principles of our laws" to undergraduate students so that "they would become qualified to take the important station of judges."<sup>254</sup> But his argument here is just a reiteration of William Blackstone's argument that Oxford needed professors of English law to, among other things, teach the students, who may one day sit as judges, how to know and rightly apply the English law.<sup>255</sup>

Austin reflected Blackstone in other ways, as well. As stated previously, when reflecting on the reforms that had occurred prior to the 1814 republication of his letters, Austin acknowledged "the utility of the profession, when conducted upon those honorary principles which give lustre to science."<sup>256</sup> Austin's use of principles and science is reflective of an English Enlightenment understanding of law based on foundational first principles, and law as a science that can be studied and applied. Like Blackstone, Austin anticipated that a focus on foundational first principles and the science of law would lead to the "happiness" (fitness or right-ordering) of society.<sup>257</sup> Austin believed that lawyers who followed in this path, rather in the path of ignorance or selfish gain, should be placed in "that rank of society, which the most respectable and learned men, of all ages, have been zealous to consider them."<sup>258</sup> He also believed that the reforms

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<sup>252</sup> BLACK'S LAW DICTIONARY, *supra* note 45, at 83 ("arbitration"), 83–84 ("arbitrator") and 1005 ("reference").

<sup>253</sup> For an example of an early American law dictionary that includes the English model of arbitration, see GILES JACOB, THE NEW LAW DICTIONARY 187 (1811).

<sup>254</sup> Austin 1786, *supra* note 1, at 25.

<sup>255</sup> BLACKSTONE'S COMMENTARIES, *supra* note 247. Blackstone makes this argument in the introductory portion of his *Commentaries*. It is an argument he previously made in the law lectures, which preceded his *Commentaries* by about a decade. Blackstone's *Commentaries* were the most read law books in the American colonies from before the American Revolution through the Civil War.

<sup>256</sup> Austin 1814, *supra* note 1, at 61.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 60.

enacted from 1786–1814 had pointed Massachusetts’ lawyers in that direction.

Thus, in his discussion arbitration and in his theories about law, the layperson, and the legal profession, Austin was engaging his readers in a history of arbitration that existed long before 1925. English common law arbitration was incorporated into the American common law, and state-level statutory forms of arbitration soon followed. As a result, common law arbitration, statutory arbitration, and litigation coexisted, largely in harmony, throughout the antebellum period.<sup>259</sup>

Considering Austin’s pamphlet campaign in light of history provides a starting point for reconsidering the richness of arbitration in the antebellum period and the existence of complex, statutory forms of arbitration well before the Federal Arbitration Act of 1925. But perhaps the greatest implication of understanding these richer histories lies in the third implication of Austin’s pamphlet campaign, which is the continuity of not only the methods of dispute resolution available across American history, but also the motives for their use.

Austin began his pamphlet campaign making positional, polarized arguments for the use of arbitration in place of litigation. While Austin’s proposal for replacing the system of court litigation almost entirely with layperson arbitration was not adopted, his broader reasons for encouraging arbitration and his concerns about litigation-based dispute resolution have their counterparts today. In other words, Austin’s arguments in favor of arbitration as a pathway to justice are not unique to his times.

Dispute resolution scholars have identified six primary motives for using dispute resolution today. They are: (1) “saving time and money”; (2) “having ‘better’ processes—[that are] more open, flexible and responsive to the unique needs of the participants . . . [a] motive often . . . connected with negative feelings toward law and lawyers”; (3) “achieving ‘better’ results—outcomes that serve the real needs of the participants or society”; (4) “enhancing community involvement in the dispute resolution process”; and (5) “broadening access to ‘justice’” with (6) “[an additional] motive, sometimes subconscious, . . . [of protecting] turf for oneself, an institution, or a profession.”<sup>260</sup>

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<sup>259</sup> For this coexistence in antebellum New Jersey and Kentucky, *see generally* Conklin, *supra* note 13. For the coexistence of common law arbitration and statutory arbitration, *see generally* Sturges, *supra* note 71.

<sup>260</sup> LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 13 (4<sup>th</sup> ed. 2009). The literature on dispute resolution is replete with arguments for and against both dispute resolution and litigation, as well as arguments for an approach that seeks to combine the benefits of both. A sampling of recent symposia highlights the prevalence of

## LOST OPTIONS FOR MUTUAL GAIN

Benjamin Austin appealed to these same six motives in his pamphlet campaign, suggesting that modern-day reasons for pursuing dispute resolution are not so different from the reasons that led people to common law arbitration, statutory arbitration, or reference in early America.

First, Austin argued for a system of dispute resolution that would avoid “long, unnecessary delays [that] will swell a bill of costs,”<sup>261</sup> or, in contemporary terms, “sav[e] time and money.”<sup>262</sup> Austin argued that individuals who sought the advice of lawyers ended up in the “most distressing difficulties” as their dispute became a matter for the lawyers to decide, and at an expense that risked the individual’s property as well as exposed him to “individual . . . ruin.”<sup>263</sup> Rather than having their lawsuits resolved, Austin found that disputants were “reduced to the humiliating state of submitting to the extortion of official fees without any remedy”<sup>264</sup>; lawsuits “enormously swelled” the debts of the people, causing additional problems to arise.<sup>265</sup> Rather than seeing the time and money spent on litigation as a necessary part of the litigation process, Austin placed the blame for undue delay and expense directly on the lawyers: “[B]y our present mode, the lawyers become parties by their fees, and are too apt to delay the business while there is any prospect of further profit.”<sup>266</sup> The lawyers also caused delay by their influence on the juries, who were “often . . . hindered from coming to a speedy decision on a cause, by the labouring pleadings of the ‘order’[.]”<sup>267</sup> Austin describes what he perceives to be the lawyers’ strategic system of delay as follows:

[I]nstead of a fair, equitable enquiry into the subject, every little advantage is taken of each other. The parties are harrassed by constant attendance: the trial is put off under some sham pretence to another term; and by the finesse

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these six motivations in current debates on dispute resolution. See Symposium, *Against Settlement: Twenty-Five Years Later*, 78 *FORDHAM L. REV.* 1117, 1117–1280 (2009–2010); Symposium, *American Justice at a Crossroads: A Public and Private Crisis*, 11 *PEPP. DISP. RESOL. L.J.* 1, 1–180 (2010–2011); and Symposium, *ADR and the Rule of Law*, 2011 *J. Disp. Resol.*, 1, 1–195 (2011).

<sup>261</sup> Austin 1786, *supra* note 1, at 40.

<sup>262</sup> RISKIN, *supra* note 260, at 13.

<sup>263</sup> Austin 1786, *supra* note 1, at 4.

<sup>264</sup> Austin, *supra* note 1, at 5. Austin included both “Court charges” and “lawyers’ fees” in this category of extortion, and also advocated for a “fee table” to regulate the Court charges. *Id.* at 6, 10.

<sup>265</sup> *Id.* at 5.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 10.

practiced, the Judges themselves are obliged to consent to the delay.— Finally, after sauntering at the heels of a lawyer from term to term, and burthened [sic] with expenses, the cause is either submitted to a Rule of Court, or the richest party by bearing down the estate of the other, obtains judgment in his favor.<sup>268</sup>

Austin described this system as a “tedious labyrinth.”<sup>269</sup> He expressed specific concerns over those situations in which, through such delay, “a wealthy man may silence a whole [B]ar. . . . Does not such practice deprive a poor man of every necessary mean to obtain his plea?”<sup>270</sup> Rather than seeing the necessity for lawyers, Austin was driven to ask “whether there is one case that absolutely requires the assistance of this ‘order?’”<sup>271</sup>

In contrast to the system of delay and expense that prevailed in litigation, Austin advocated for a dispute resolution system in which “there would be no ‘order’ whose interest it was to perplex and delay.”<sup>272</sup> The primary component of his system was binding arbitration. Austin wanted to see disputes resolved in a “speedy and impartial determination...without the enormous imposition of Court charges, and lawyers fees.”<sup>273</sup> Austin argued that arbitration would prevent “great trouble and expense.”<sup>274</sup> Such a system would meet the needs of merchants and non-merchants, alike, since “nineteen cases in twenty could . . . be decided as equitably by referees, as by a tedious court process.”<sup>275</sup>

Second, Austin argued that arbitration would better suit individual needs for dispute resolution In an increasingly complex society, which is another way of arguing for “‘better’ processes.”<sup>276</sup> Austin believed that, in his day,

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<sup>268</sup> Austin, *supra* note 1, at 19. See *Id.* at 32 for a discussion of the costs accrued by clients who are forced to “‘dance attendance’ for many days before [their] case is brought forward.” Austin argued that merchants suffered even greater expenses of time and money because the lawyers were “wholly unacquainted with all mercantile concerns,” which resulted in “a rule of Court,” sending the case to reference. *Id.* at 5.

<sup>269</sup> *Id.* at 26.

<sup>270</sup> *Id.* at 20.

<sup>271</sup> *Id.* at 6.

<sup>272</sup> *Id.* at 24.

<sup>273</sup> Austin 1786, *supra* note 1, at 8. Austin also advocated for no representation in civil cases or, at the very least, representation by a chosen friend; for a concise system of law codes; and for an Advocate-General to act on behalf of those accused of crimes. *Id.* at 23–24.

<sup>274</sup> *Id.* at 9.

<sup>275</sup> *Id.* at 25.

<sup>276</sup> RISKIN, *supra* note 260, at 13.

lawyers were “rendering intricate even the most evident principles of law” and that, instead of helping individuals to decide disputes, lawyers instead were (as he so famously accused Selfridge), “employed as agents” for disputants until such time as the dispute was ordered, by court, to be resolved in arbitration.<sup>277</sup> In contrast to the that the practice of law as it had become, Austin sought to “render the laws a blessing,” and advocated for a system of binding arbitration as the best means for meeting this end.<sup>278</sup> Parties who submitted their disputes to binding arbitration would not only enjoy cheap and] speedy access to justice, but also the security of knowing that their “estates” would not be ruined “in consequence of perplexing law suits.”<sup>279</sup> Poor men and rich men would stand on equal ground throughout the dispute resolution process as they sought to settle their dispute.<sup>280</sup> In addition, all individuals who submitted their disputes to arbitration would enjoy a level of dignity and respect in the process, which was not always granted to them through the course of litigation.<sup>281</sup>

Third, Austin believed that arbitration would bring “‘better’ results”<sup>282</sup> for the disputants than a ruling by a court of law. As discussed previously, merchants would continue to enjoy the benefit of having their disputes decided by arbitrators who were well-versed in mercantile law. Even in court, Austin anticipated better outcomes with a more heavy emphasis on layperson involvement in dispute resolution. For example, disputants would enjoy the benefit of having jurors and judges decide the issues of the case without first wading through the arguments of those lawyers who “perplex and embarrass every judicial proceeding . . . rendering intricate even the most simple principles of law.”<sup>283</sup> And all disputants would enjoy the benefit of retaining the bulk of their damages awards, without surrendering a large portion of that award to pay the fees of lawyers.<sup>284</sup>

Fourth, Austin argued specifically for layperson involvement in dispute resolution, an anticipation of modern-day arguments for “community involvement in the dispute resolution process.”<sup>285</sup> It is within this argument that Austin most strongly included anti-lawyer sentiment, which corresponds

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<sup>277</sup> Austin 1786, *supra* note 1, at 4–5.

<sup>278</sup> *Id.* at 5.

<sup>279</sup> *Id.* at 8.

<sup>280</sup> *Id.* at 6, 620.

<sup>281</sup> *Id.* at 10–11.

<sup>282</sup> RISKIN, *supra* note 260, at 13.

<sup>283</sup> Austin 1786, *supra* note 1, at 4.

<sup>284</sup> *Id.* at 11.

<sup>285</sup> RISKIN, *supra* note 260, at 13.

to today's motive of "negative feelings toward law and lawyers."<sup>286</sup> Thus, Austin argued for cheaper and speedier access to justice, better dispute resolution processes, and better dispute resolution outcomes not only as ends unto themselves, but also because he believed strongly in the layperson's ability to be involved in the resolution of his own disputes—whether legal or non-legal in nature. In this line of argument, Austin strongly mirrored the arguments of William Blackstone, who similarly advocated for layperson study and application of the law in the introductory portion of his *Commentaries on the Laws of England*. In fact, throughout his pamphlet campaign, Austin repeatedly advocated for the layperson's ability to know and apply the law. To the extent that the law had been unduly complicated through Massachusetts' adoption of the English common law, Austin argued for the creation of a more simplified code of Massachusetts law, and, as discussed previously, the creation of a Professorship in Law at the university level to teach that law not only to the aspiring lawyer, but to the layperson, as well.<sup>287</sup>

Austin also advocated for layperson involvement in judicial dispute resolution, claiming that "without the false glosses and subterfuges too often practised [sic] by lawyers," layperson jurors had all the "Law and Evidence" they needed to "determine on the cause."<sup>288</sup> He argued that laypersons were more than capable of submitting their own pleadings to the judge or jury<sup>289</sup> and that if they felt any lack in this area, they needed only to enlist the aid of a friend to provide assistance. In such a system, the parties in dispute would be "admitted to give a plain story, without any assistance from lawyers," and it would be a story that other community members—the individuals sitting on the jury—would be able to understand and rightly decide.<sup>290</sup>

Fifth, in making the above arguments, Austin was creating a counter-argument to what he perceived as a "protect[ion of] turf" by individual lawyers and the legal profession<sup>291</sup> while also making an argument that the layperson had his own turf to protect. Austin's version of the modern-day turf argument is perhaps best highlighted by Austin's consistent description of the "order" of lawyers as the rising "lawyer class". In contrast to claims about the necessity of legal representation, Austin argued that the vast majority of disputes did not "require[] any material law question" and that,

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<sup>286</sup> *Id.*

<sup>287</sup> Austin 1786, *supra* note 1, at 12, 20, 25.

<sup>288</sup> *Id.* at 5–6.

<sup>289</sup> *Id.* at 23–24.

<sup>290</sup> *Id.* at 19–20.

<sup>291</sup> RISKIN, *supra* note 260, at 13.

even those that did include such law questions “could have been decided without the assistance of the [B]ar.”<sup>292</sup> The fact that such disputes made their way into court was, to Austin’s way of thinking, the result of lawyers protecting their turf by soliciting lawsuits, much as he had claimed of Thomas Selfridge; lawsuits are “nourished by a band of lawyers, merely to make money for themselves, from the purses of their clients.”<sup>293</sup> Austin saw this system as self-perpetuating: as one individual in a dispute retained a lawyer, the other disputant would feel obligated to retain “a lawyer equally as ‘cunning’ as his antagonist,” or, if not, be taken advantage of, as a result.<sup>294</sup>

Finally, Austin’s overarching purpose in writing and in creating proposals for legal reform was to “broaden[] . . . access to ‘justice’”<sup>295</sup> for every person, a motive that remains for disputants, today. When Austin appealed to these six motives in 1786, and again, in his Prefatory Comments in 1814, he did so because he believed that the system of court litigation, as it had begun to develop in early Massachusetts, was particularly unable to secure the cheap, speedy, and final resolution of disputes. In other words, whether as a result of increasingly steep fees for representation; complexity that led to delay; or the lack of finality of lower court decisions, Austin believed that the rising legal profession was particularly unable to secure justice for individuals in disputes.

Austin argued for arbitration because he believed that a system of arbitration, which would be regulated and carried out by laypersons, was more likely to secure justice for individuals in conflict than representation by professional lawyers in courts of law. In making his arguments, Austin attempted to appeal to the many different motives that might lead his readers to arbitration instead of court. While Austin’s pamphlet was written to address layperson-lawyer conflict in late-eighteenth century Massachusetts, many of his arguments have been present across Anglo-American legal history, and are persuasive to advocates of arbitration today. Much has changed in the content of the law and the nature of legal disputes since Austin’s day, but a review of the method of dispute resolution for which he advocated, and the motives to which he appealed, suggests that, at least in the field of arbitration, much also has stayed the same.

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<sup>292</sup> Austin, *supra* note 1, at 38 (emphasis omitted).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 22.

<sup>295</sup> RISKIN, *supra* note 260, at 13.

## VII. CONCLUSION

In his efforts to promote arbitration as a replacement for the growing system of lawyer-based litigation in late-eighteenth and early-nineteenth century Massachusetts, Benjamin Austin provided for his own failure by basing his arbitration proposals almost entirely on a foundation of anti-lawyer hostility that was neither compelling to, nor workable for, individuals seeking to resolve their legal disputes. Even merchants, who had favored arbitration due to the courts' lack of understanding of mercantile law, began to turn to the courts as commercial transactions became more complex, communities became more diverse, and lawyers and judges demonstrated that they knew, and could rightly apply, mercantile law.

With no real foundation to appeal to a wider audience, Austin failed to secure the triumph of arbitration over the rising legal system. Yet, in contrast to the prevailing histories, Austin's story is not one of loss and decline. Although he failed to secure the triumph of arbitration over litigation in the years following his 1786 pamphlet campaign, Austin did see the passage of statutory forms of arbitration, and his pamphlet campaign seems to have encouraged arbitration, keeping it alive, in its various forms, as a time-honored method of dispute resolution—one that existed, in Massachusetts, alongside the growing legal system, throughout the antebellum period.<sup>296</sup> As his later reflections on his own pamphlet campaign indicate, Austin realized that although he had lost the battle, he had won the war; arbitration had not replaced the developing legal system in early America, but the legal reforms that followed his pamphlet campaign brought about the type of correctives and access to justice that Austin, in promoting a dispute resolution system based almost entirely on arbitration, had hoped to achieve. Once such reforms had been secured, it was not so important that arbitration be the sole method of dispute resolution; the harms that came from the "pernicious practice of law" had, at least for a time, been mitigated, even as representation in litigation, and the number of lawyers, continued to grow.

In accepting legal reform that combined litigation and arbitration, Austin, perhaps inadvertently, promoted a coexistence of litigation and arbitration that had been present in both England and the American colonies. In so doing, Austin, again perhaps inadvertently, promoted a broad, creative, and

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<sup>296</sup> The form of statutory arbitration passed by Massachusetts in 1786 and upheld in 1836 continued to be included in the Revised Statutes, with increasing support for variances from the statutory structure, at least through the Massachusetts statutory revisions of 1860. See generally, *Revised Statutes*, *supra* note 237 and *Of Reference to Arbitration by Agreement before a Justice of the Peace*, MASS. GEN. LAWS ch. 147 (1860), *supra* note 238.



## LOST OPTIONS FOR MUTUAL GAIN

varied system of dispute resolution that included both common law and statutory arbitration, meeting the new needs of disputants while also acknowledging, affirming, and accounting for past reasons for the disputants' use of arbitration. Thus, his call for reforms helped to forge a compelling and workable dispute resolution system that made room for the increasing use and professionalization of the law courts while also keeping arbitration strong in the common law, statutes courts throughout the antebellum period.

Although Austin's arguments were framed in anti-lawyer sentiment, Austin nevertheless voiced many of the motives that, today, lead a variety of people to use extrajudicial dispute resolution instead of resorting to court. Ultimately, those motives are tied up in our concepts of justice, and justice requires both a just process—one that is, at minimum, even-handed and fair, respectful of human dignity, and not overly expensive or time consuming—and a just outcome—one that comports to the parties' agreement, or to legal or non-legal standards of what is "fair" or "right." Austin originally thought that the only way to ensure just processes and outcomes would be to send the vast majority of disputes through arbitration, instead of litigation, where delay, expense, and confused rulings seemed to win the day. What he found, instead, was that the piecemeal legal reforms that were enacted from 1786 to 1814 did much to address the injustices he spoke out against, enabling court-based litigation and statutory arbitration to achieve what common law arbitration had already been doing so well: securing cheap and speedy access to justice for everyone, layperson and lawyer alike.

